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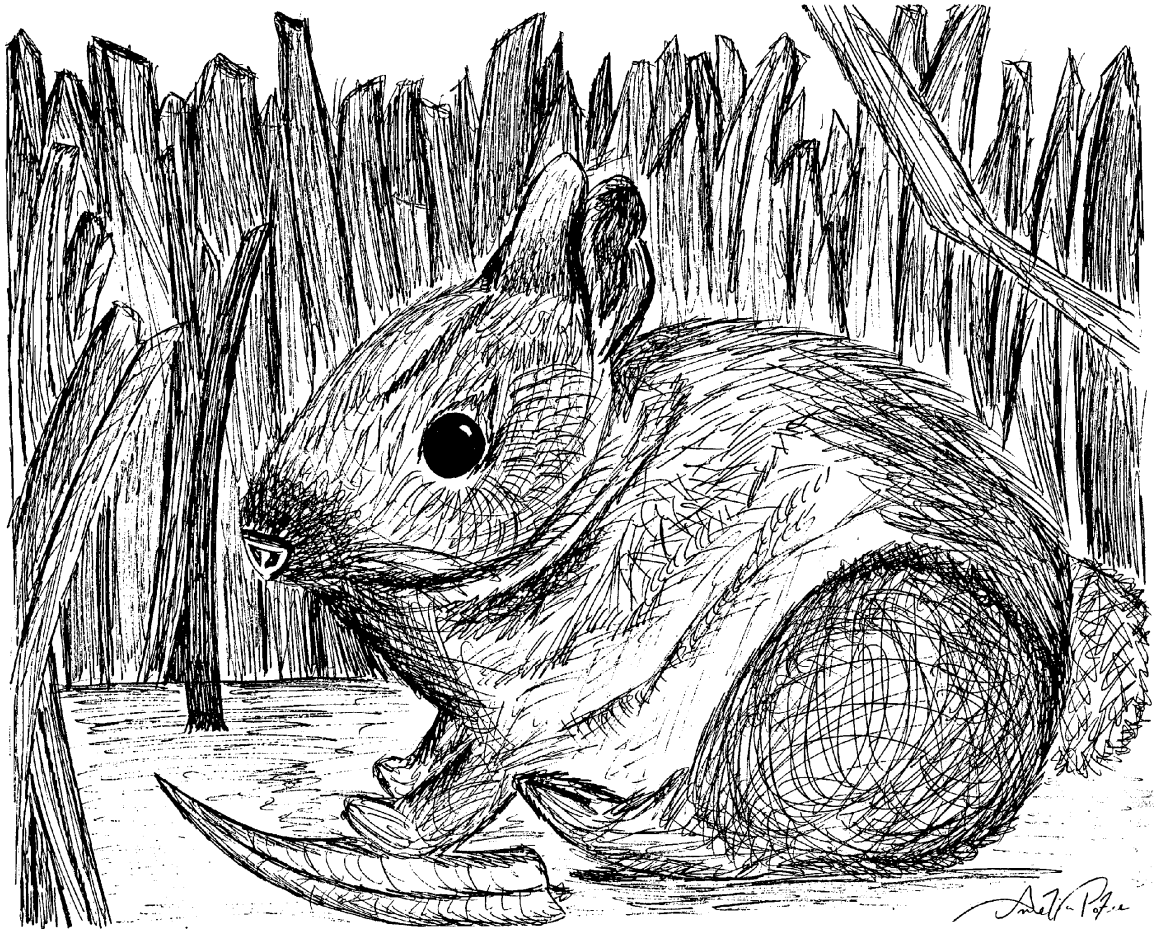

This month's front cover artwork:

Artist: *Amelia Potee*
12th grade
Rockwall 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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PROPOSED RULES

WITHDRAWN RULES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.texas.gov/

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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 (1-800-735-2989).

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 18. TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

CHAPTER 471. OPERATING RULES OF THE TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

The Telecommunications Infrastructure Fund Board (TIFB) proposes the repeal of §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30 - 471.33, 471.50, 471.60, 471.70, 471.80, 471.90 - 471.92, 471.100 and new §§471.3, 471.11, 471.13 and 471.51, concerning Operating Rules of the Telecommunications Infrastructure Fund Board.

The purpose of the repeal and replacement is to update the TIFB rules in order to provide clarity of operations for entities working with the TIFB.

The Telecommunications Infrastructure Fund Board previously published the repeal and replacement of Chapter 471 in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11781). That version has been withdrawn elsewhere in this issue of the *Texas Register*.

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

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

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

Comments on the proposal may be submitted to Michelle Pundt, Telecommunications Infrastructure Fund Board, P.O. Box 12876, Austin, Texas 78711, (512) 344-4306 or email at: mpundt@tifb.state.tx.us.

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

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

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

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

§471.3. Number, Terms of Office and Qualifications.
§471.5. Chairman.
§471.7. Vice-Chairman.
§471.9. Compensation of Board Members.
§471.11. Place of TIF Board Meetings.
§471.13. Regular Meetings.
§471.15. Emergency Meetings.
§471.17. Executive Sessions.
§471.19. Quorum, Manner of Acting and Adjournment.
§471.30. Finance and Audit Committee.
§471.31. Other Committees.
§471.32. Advisory Committees.
§471.33. Committee Procedure.
§471.50. Contracts and Appointments of Agents.
§471.60. Rules Governing Acceptance of Gifts, Grants and Donations.

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

§471.80. Private Interest in Measure or Decision.

§471.90. Fiscal Year.

§471.91. Books and Records.

§471.92. Effective Date of Rules.

§471.100. Amendments to the Rules.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101772
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 344-4306

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1 TAC §§471.3, 471.11, 471.13, 471.51

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

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

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

(a) Donations with a value of $500 or more shall be accepted by a majority of the Board in an open meeting. The minutes of the meeting shall reflect the name of the donor, a description of the gift, and the purpose of the gift.

(b) Administration and investment of funds. Donated funds shall be deposited in the state treasury.

(c) Approved Relationships.

(1) The recipient of a gift, grant, or donation may, while employed by the TIFB, serve as an officer of director of a donor.

(2) The recipient of a gift, grant, or donation may, while employed by the TIFB, receive compensation for services rendered to the donor.

(d) Restricted Activities.

(1) No officer or employee who serves as an officer or director of a donor will vote on or otherwise participate in any measure, proposal, or decision pending regarding the donor if that officer or employee might reasonably be expected to have an interest in the measure, proposal, or decision.

(2) No officer or employee will accept employment from or engage in any business or professional activity with a donor, which might lead to disclosure of confidential information acquired by reason of the person's official position with the TIFB.

(3) No officer or employee will accept employment or compensation from a donor, which might impair one's independence of judgment in the performance of official duties with the TIFB.

(4) No officer or employee will make personal investments in association with a donor, which might create a substantial conflict between the officer or employee's private interest and the interest of the Board.

(5) No officer or employee will accept or solicit any gift, favor, or service from a donor, which might tend to influence the exercise of official conduct.

(6) No officer or employee will intentionally or knowingly solicit, accept or agree to accept any benefit for having exercised official powers on behalf of a donor or for having performed official duties in favor of a donor.

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

(1) A donation is a gift of property, including money or services, to the Board.

(2) A donor is an individual, not an employee or officer of the Board, or an organization that gives or offers to give a donation to the Board.

(3) An employee is a person employed by the TIFB on a full-time or part-time basis

(4) An officer is the Executive Director of the TIFB or appointed member(s) of the Board.

§471.11. Procurement, Contract Dispute Resolution.

(a) All TIFB contracts will include text related to the concerted effort to utilize a dispute resolution process.

(b) Contract Text. The contract text will read as follows:

(1) "Resolution of Contract Claims-Dispute Resolution Process.

(A) The dispute resolution process provided for in chapter 2260 of the Government Code shall be used, as further described herein by TIFB and the Performing Agent to attempt to resolve any claim for breach of contract made by the Performing Agent.

(B) The Performing Agent and the Agency will use the dispute resolution process provided in Chapter 2260 of the Government Code to attempt to resolve any claim for breach of contract made against the Agency. To initiate the process, the Performing Agent must submit written notice, as required by subchapter B to the Agency's Executive Director. The notice will specifically state that the provisions of Chapter 2260, subchapter B are being invoked. The contested case process provided in Chapter 2260, subchapter C, of the Government Code is the Performing Agent's sole process for seeking a remedy for any and all alleged breaches of contract by the Agency if the parties are unable to resolve their disputes under this paragraph. Compliance with the contested case process provided in subchapter C is a condition precedent to seeking consent to sue from the Legislature under Chapter 107 of the Civil Practices and Remedies Code. Neither the execution of the contract by the Agency nor any other conduct of any representative of the Agency relating to the contract is considered a waiver of sovereign immunity to suit. The submission, processing and resolution of the Performing Agent's claim is governed by the published rules adopted by the Attorney General pursuant to Chapter 2260, as currently effective, hereafter enacted or subsequently amended. The pendency of a claim does not constitute ground for the suspension of performance by a party, in whole or in part.

(2) Neither the occurrence of an event nor the pendency of a claim constitute grounds for the suspension of performance by the Performing Agent, in whole or in part."

(c) Responsibilities.

(1) The Executive Director and the Director of Finance and Administration will be notified of any contract disputes within one working day following receipt of such notice. The employee receiving such notice of dispute will document such notice through submission of an Activity Report.

(2) The Executive Director or the Director's designee will notify counsel of all claims against the agency and will notify the State Office of Administrative Hearings of the need for a hearing.

(d) Definitions.

(1) A contract is a written agreement executed between a state agency or institution of higher education and a contractor for goods and services.

(2) A contractor is an independent person(s) or firm, not including subcontractors, who enters into a contract directly with a state agency or institution of higher education.

§471.13. Historically Underutilized Business Participation.

(a) Goal. The Telecommunications Infrastructure Fund Board will promote equitable business opportunities in the State of Texas through its daily operations and grant awards to its constituency. TIFB will strive to assist Historically Underutilized Businesses at a rate not less than 30 percent of the total value of all contract awards for the purchase of goods or services during each fiscal year.

(b) Objective. The Telecommunications Infrastructure Fund Board will strive to meet the Historically Underutilized Business goals related to the daily operation of awarding grant opportunities in the State of Texas, which are:

(1) Commodities--12.6 percent,

(2) Professional Services--20 percent, and

(3) Other Services--33 percent.

(c) Strategy.

(1) The Telecommunications Infrastructure Fund Board will make a good faith effort to utilize HUB vendors to procure goods and services through a review and contact of the vendors found on the Central Master Bidders List and Qualified Information System Vendor Program list.

(2) Also, the Telecommunications Infrastructure Fund Board's guidelines mandate grantees to follow an open procurement process for approval of encumbering or expending grant funds.

(A) Grantees not using the purchasing services of the General Services Commission's Cooperative Purchasing Program or other approved purchasing cooperative must submit the bid documentation to TIFB for equipment and services costs result in expenditures of $15,000 and greater.

(B) As mandated by Article 601b, Texas Civil Statutes, grantees must make a good-faith effort to encourage Historically Underutilized Businesses to bid on services for grant-funded projects, and report the amount of the dollars contractually awarded to HUBs.

(d) Assessment. The Telecommunications Infrastructure Fund Board will for the purpose of Strategic Planning, report its operating expenditures related to Historically Underutilized Business performance figures. Also, the Telecommunications Infrastructure Fund Board will document and monitor the performance in an on-going manner to its Director of Finance and Administration. The Director of Finance and Administration is responsible for circulating this information to the Executive Director.

§471.51. Proposal Award, Award Decision Appeal.

(a) Applicants and/or grantees may formally appeal funding decisions if TIFB:

(1) Denies an application for funding, in part or whole

(2) Terminates a grant project, or

(3) Imposes sanction upon an active grantee

(4) If an applicant and/or grantee wishes to appeal a decision made by TIFB, that applicant must submit an appeal, in writing to the Executive Director within 20 business days from the date of notification of a denial, grant termination, or grantee sanction. Applicant and/or grantee appeals must include the basis for the appeal, including all supporting documentation, and must be signed by the authorized official for the grant application or project.

(5) An applicant and/or grantee must base an appeal upon a verifiable error made during the prioritization and/or review process. An applicant and/or grantee must show that TIFB error caused the actual denial of a grant application, in part or in whole, the termination of a grant project, and/or the imposition of a sanction upon an active grantee.

(6) The Executive Director will issue a final decision, in writing, within 60 days of the receipt of an appeal letter. If the Executive Director has rendered no decision within the 60-day period following the receipt of the appeal, the original decision will stand and the appeal will therefore be considered denied.

(b) Responsibilities. The Executive Director will make all determinations for written appeals.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101773
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 344-4306

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 12. WEIGHTS AND MEASURES
SUBCHAPTER C. PACKAGES AND PRICE VERIFICATION

4 TAC §12.21

The Texas Department of Agriculture (the department) proposes an amendment to §12.21, concerning the examination procedure for price verification in the department's weights and measures program. The purpose of the amendment to §12.21 is to delete the statement declaring that the department adopts by reference NIST Handbook 130 relating to "Examination Procedure for Price Verification." This deletion is necessary because the department no longer intends to implement the price verification procedures as outlined in NIST Handbook 130, due to time

and staff constraints. The department will revisit the issue when additional resources become available.

Stephen Pahl, coordinator for weights and measures, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the section, as amended. There will be no fiscal implication for local government as a result of enforcing or administering the section, as amended.

Mr. Pahl 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 enforcing the section will be a more efficient use of departmental resources when conducting price verification inspections. There will be no anticipated costs to small or large businesses or to persons required to comply with the amendment.

Comments on the proposal may be submitted to Stephen Pahl, Coordinator for Weights and Measures, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendment to §12.21 is proposed under the Texas Agriculture Code §12.016 which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the execution of applicable laws relating to agriculture, §13.002 which authorizes the department to supervise all weights and measures sold or offered for sale in this state and §13.021 which authorizes the department to adopt rules for the purpose of bringing about uniformity between the standards established under the Texas Agriculture Code and the standards established by federal law.

The code affected by this proposal is the Texas Agriculture Code, Chapter 13.

§12.21. Standards.

The department adopts by reference NIST Handbook 133, and NIST Handbook 130, relating to "Packaging and Labeling Regulation" and [~~;~~] "Method of Sale Regulation"[~~; and the "Examination Procedure for Price Verification."~~]. Handbooks 130 and 133 are available upon request from the Superintendent of Documents, United States Government Printing Office, 710 North Capitol Street, Washington, D.C. 20402.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101760
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 463-4075

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CHAPTER 27. TEXAS AGRICULTURAL FINANCE AUTHORITY: PREFERRED LENDER PROGRAM RULES

4 TAC §§27.1 - 27.8

The Board of Directors of the Texas Agricultural Finance Authority (TAFA) of the Texas Department of Agriculture (the department) proposes new §§27.1 - 27.8, concerning procedures for participation in the TAFA Preferred Lender Program. The new chapter is proposed in order to provide lenders of Texas an opportunity to participate in a preferred lender program for the Young Farmer Loan Guarantee Program and the Farm and Ranch Finance Program and to establish standards and procedures for the new program. The preferred lender program will provide approved lenders the ability to receive application approval for eligible applicants within a two-week time period and will allow approved lenders to receive preapproval for all documentation required for closing an approved commitment. The new sections state the purpose of the program, provide definitions to be used in the chapter, establish qualifications and application procedures for a preferred lender and required information for applications submitted for the consideration to the respective programs, and establish the commitment approval process, notification procedures for an approved or denied application, procedures for the default of an approved commitment, and procedures for an annual review and notification process by TAFA for approved participating preferred lenders.

Mr. Robert Kennedy, Deputy Assistant Commissioner for Agricultural Finance, has determined that for the first-five year period the new sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new sections. It is anticipated that the revenue generated by the program from application fees and interest income will be adequate to cover cost of administration of the program.

Mr. Kennedy also 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 the potential to generate greater number of approved commitments for agricultural entities by providing the lending community an opportunity to receive expidited service from TAFA. There will be no effect on small business. There will be no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Mr. Robert Kennedy, Deputy Assistant Commissioner for Finance, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of this proposal in the *Texas Register*.

The new sections are proposed under the Texas Agriculture Code, §58.022 and §59.022, which provide the TAFA board with the authority to adopt rules and procedures for administration of the programs of TAFA.

The code affected by the proposal is the Texas Agriculture Code, Chapters 58 and 59.

§27.1. Purpose.

The Texas Agricultural Finance Authority (the Authority) is mandated by the Texas legislature to provide financial assistance to eligible agricultural entities throughout the state. The Authority has determined that for the Young Farmer Loan Guarantee Program and the Farm and Ranch Finance Program, lenders have the necessary policies and procedures to assure the Authority of reasonable loan servicing practices and appropriate risk controls. This chapter establishes standards of eligibility and procedures for the lending community to participate in a preferred lender program for the two referenced programs.

§27.2. Definitions.

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

(1) Act--The Texas Agricultural Finance Authority Act, Texas Agriculture Code, Chapter 58 and Chapter 59, as amended.

(2) Applicant--Any lender or group of legally affiliated lenders applying for a designation as a preferred lender under these rules.

(3) Application--A written request from a lender, properly authorized and including all required material for a lender who desires to become a preferred lender.

(4) Authority--The Texas Agricultural Finance Authority

(5) Board--The board of directors of the Authority.

(6) Business Day--A day on which the department is open for business. The term shall not include Saturday, Sunday, or any traditional holiday officially observed by the state. The department's normal business hours are 8 a.m. to 5 p.m. each business day.

(7) Commissioner--Commissioner is the commissioner of the Texas Department of Agriculture.

(8) Commitment--An approved loan request under the appropriate program(s).

(9) Loan Request--A request submitted by a preferred lender on behalf of a potential borrower for the Program(s).

(10) Preferred Lender--Applicants approved by the Board as participants in the Preferred Lender Program for the respective Program(s).

(11) Program(s)--Program(s) are the Young Farmer Loan Guarantee Program and the Farm and Ranch Finance Program.

(12) Staff--Staff of the department designated by the Commissioner to administer programs of the Authority.

§27.3. Qualifications for the Preferred Lender Program (PLP).

The applicant must submit an application for PLP status to the Authority to include:

(1) a statement requesting PLP status for either, or both, the Young Farmer Loan Guarantee Program and the Farm and Ranch Finance Program.

(2) a summary of the applicant's capability to adequately approve, including the approval process, and service the requested commitment(s);

(3) evidence of credit examination and supervision of applicable state and/or federal regulatory agencies to include a certificate of good standing from these agencies;

(4) a statement of ability to properly service and discharge its loan making and servicing responsibilities;

(5) a sample of the applicant's credit management system, which contains policies and underwriting standards; loan and security documentation; credit file management documentation; collateral management system documentation; and portfolio management system;

(6) a compilation of the historical loan loss ratio for loans comparable to the two programs under these rules over the last five years, or a copy of the call report completed by the applicant and filed with their regulatory authority for a comparable period;

(7) a copy or sample of an approved loan request including application and underwriting information. Should this be a copy of an approved application, please delete names, addresses, and other confidential information;

(8) a copy of all loan documents, which are normally used by the Preferred Lender in closing an approved loan request;

(9) evidence of other Preferred Lender Program status designations, if any;

(10) a statement of any potential conflict of interest of the borrower with any employee of the Texas Department of Agriculture or the board of the Texas Agricultural Finance Authority; and

(11) an agreement that to maintain its PLP status, the applicant must submit at least four (4) loan requests each fiscal year, which can be a combination of the two programs.

§27.4. Preferred Lender Program Approval Process.

(a) A complete application from a applicant for the Preferred Lender Program will be considered by the Board at the next regularly scheduled meeting with notification of approval or denial issued by staff to lender within ten working days after the posted meeting.

(b) Upon approval of Preferred Lender Program status, the applicant and the Authority will negotiate the proper guaranty and/or participation agreement(s) for the respective program(s).

§27.5. Required Information for a Commitment Request to the Program(s).

(a) The preferred lender will submit, at a minimum, the following, with each loan request submitted for participation in the program(s):

(1) the eligibility checklist for the respective program;

(2) the signed notification for the Texas Public Information Act;

(3) a copy of the lender's loan application;

(4) a copy of the lender's loan narrative;

(5) historical financial statements and/or tax returns for the last three years of the proposed borrower, if available;

(6) the borrower's balance sheet, which could be the year end statement and an interim statement, less than 90 days old;

(7) the borrower's cash flow budget for the period of the projected financing;

(8) a copy of the borrower's credit report;

(9) a plan for servicing the loan;

(10) a statement of any potential conflict of interest of the borrower with any employee of the Texas Department of Agriculture or the board of the Texas Agricultural Finance Authority; and

(11) any other information that could be applicable to approving or denying the loan request under the program.

(b) In addition to the minimum requirements, the preferred lender will perform at least the same level of evaluation and documentation for the commitment that the preferred lender would perform for loans not in the program.

§27.6. Approval or Denial and Issuance of Notification.

(a) Staff will review the loan request submitted for completeness and notify the preferred lender of any information that is deficient within two business days from the date received.

(b) When all information is received, staff will review the loan request and prepare a credit memorandum within five business days

of receipt, for review by the deputy assistant commissioner and/or the assistant commissioner with a recommendation for either approval or denial.

(c) The credit memorandum will contain a brief narrative of the project including the amount and terms of the commitment, the percentage of guaranty requested or participation to be purchased, summary of collateral pledged, history of the borrowers, summary financial information, and strengths and weaknesses of the operation.

(d) The assistant commissioner and/or deputy assistant commissioner will present the applications to the commissioner for approval or denial.

(e) Notification of approval or denial by the commissioner will be submitted to the lender in writing within 14 business days from the date of receipt of the completed application.

(f) If the commissioner approves the loan request, preferred lender will proceed with closing the loan request using the pre-approved loan documentation. Should any loan document be required that has not been previously approved by the Authority, a copy must be submitted to staff for approval before closing.

(g) Staff shall, within 30 business days of the preferred lender closing the commitment, perform an inspection of the project and collateral pledged to the project.

(h) The preferred lender will submit to staff a complete set of the closing documents within 10 business days of closing the commitment.

(i) Staff will have the option of reviewing any of the pledged collateral for the project upon notification of the lender and the borrower.

§27.7. Commitments in Default.

(a) The preferred lender will notify staff in writing of any condition of default, excluding payment default, that may occur by the borrower within 10 business days of the determination of default. In the case of a payment default preferred lender with notify staff of any payment default when such account is 30 days past due.

(b) The preferred lender will notify staff in writing of any collection efforts to be taken by the preferred lender against the borrower.

(c) The preferred lender will notify staff of a request of any deferrals or restructures of the original commitment prior to any deferral or restructure, and receipt of written notification of approval from staff prior to any deferral or restructure.

(d) Any payment by the Authority will be pursuant to the appropriate agreement negotiated between the Authority and the preferred lender for the respective program.

§27.8. Review of Preferred Lenders by the Authority.

(a) The Board will review each approved preferred lender after each biennium of the state to determine the preferred lender's participation in the program.

(b) The Board may at its discretion disqualify a preferred lender, at any time, from its preferred lender status for any action identified by the Authority, which would not be reasonable and prudent by a comparable lender for a similar account.

(c) Should a preferred lender be determined in non-compliance with these rules and procedures or be disqualified by the Board, the preferred lender will be notified in writing of any actions taken by the Board.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101769
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 1. CONSUMER CREDIT COMMISSIONER

SUBCHAPTER I. INSURANCE

7 TAC §1.802

The Finance Commission of Texas (the commission) proposes an amendment to 7 TAC §1.802, concerning single interest insurance for an automobile.

The purpose of the amendment is to exempt automobile property insurance from the provisions of the property insurance rule. Prior to 1997 most loans on automobiles were governed by Chapter 4 of the Credit Code. When Chapter 342 was adopted, it merged the old Chapter 3 and Chapter 4 provisions. The rule §1.802 was adopted in May 1999 based upon the property insurance provisions as they had been applied under the old Chapter 3. Although no comments were received at the time the rule was adopted it has become apparent that writing property insurance on automobiles at non-standard rates was formerly permissible, but has been restricted by the adoption of 7 TAC §1.802. This amendment would remove the restriction and allow automobile property insurance to be written at non-standard rates. Removing the restriction would furthermore restore parity between financing of automobiles under the loan chapter and the retail sales chapter.

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

Commissioner Pettijohn also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the new rules will be enhanced compliance with the credit laws and consistency in credit contracts. No net economic cost will result to persons affected by the rules. There is no adverse impact to small business. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

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.

The amendments are proposed 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 §342.551 grants the Consumer Credit Commissioner and the Finance Commission the authority to interpret the provisions of Title 4, Subtitle B, in which Chapter 342 is located.

These rules affect Chapter 342, Texas Finance Code.

§1.802. Authorized Property Insurance.

(a) Property insurance, other than insurance covering an automobile, written in connection with a loan made under Chapter 342 must be written at rates not in excess of the rates fixed or approved by the Texas Department of Insurance if a rate structure has been fixed or approved for that particular type of coverage.

(b) If property insurance, other than insurance covering an automobile, requested or required on a loan is sold or obtained by a licensee at a rate that is not fixed or approved by the Texas Department of Insurance, the licensee must first obtain prior acknowledgment from the commissioner that the coverage and the rate bear a reasonable relationship to:

(1) the amount, term, and conditions of the loan;

(2) the value of the collateral; and

(3) the existing hazards or risk of loss, damage, or destruction.

(c) Insurance, other than insurance covering an automobile, written at rates not fixed or approved by the Texas Department of Insurance is subject to cancellation or adjustment if the insurance is not otherwise approved by the commissioner.

(d) If a licensee is seeking authority from the commissioner under subsection (b) of this section for a rate not fixed or approved by the Texas Department of Insurance, a copy of the relevant policy that is to be issued shall be filed with the Office of Consumer Credit Commissioner, together with any evidence that is probative on the factors listed in subsection (b) of this section.

(e) Property insurance written in connection with a Chapter 342 loan must be provided by a company authorized to do business in this state.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101677
Leslie L. Pettijohn
Consumer Credit Commissioner
Finance Commission of Texas
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 936-7640

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7 TAC §1.805

The Finance Commission of Texas (the commission) proposes an amendment to 7 TAC §1.805, concerning authorized credit insurance.

The purpose of the amendment is to add the appropriate references under the Insurance Code that govern group debtor life and accident and health insurance. These are equivalent products to credit life and credit disability insurance, and thus are eligible to be written under Chapter 342. The rule simply acknowledges that authority.

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

Commissioner Pettijohn also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of the new rules will be enhanced compliance with the credit laws and consistency in credit contracts. No net economic cost will result to persons affected by the rules. There is no adverse impact to small business. No difference will exist between the cost of compliance for small businesses and the cost of compliance for the largest businesses affected by this section.

Comments on the proposed amendment 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.

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

These rules affect Chapter 342, Texas Finance Code.

§1.805. Authorized Credit Insurance.

(a) Credit insurance written in connection with a Chapter 342 loan shall be decreasing term insurance.

(b) Credit life insurance and credit accident and health insurance shall be written in compliance with Texas Insurance Code Article 3.42, 3.50, 3.51-6, and 3.53 and any regulations issued by the Texas Department of Insurance under the authority of that provision.

(c) Involuntary unemployment insurance shall be written in compliance with Texas Insurance Code Article 21.79E and any regulations issued by the Texas Department of Insurance under the authority of that provision.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101678
Leslie L. Pettijohn
Consumer Credit Commissioner
Finance Commission of Texas
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 936-7640

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PART 7. STATE SECURITIES BOARD

CHAPTER 101. GENERAL ADMINISTRATION

7 TAC §101.6

The State Securities Board proposes new §101.6, concerning the historically underutilized business program. The new rule satisfies the requirement in Texas Government Code §2161.003,

which requires an agency to adopt historically underutilized business ("HUB") rules of the General Services Commission. Those HUB rules are contained in 1 TAC §§111.111-111.28.

Don Raschke, Director of Staff Services, and Tom Spradlin, Director of Information Resources and Planning, have determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Raschke and Mr. Spradlin also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that vendors dealing with the agency will be aware of the HUB policy and program at the agency applicable to the purchase of goods and services paid for with appropriated funds. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The new rule is proposed under Texas Civil Statutes, Article 581-28-1 and Texas Government Code, §2161.003. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 2161.006 requires a state agency to adopt the General Services Commission's HUB rules as the agency's own rules applicable to the agency's construction projects and purchases of goods and services paid for with appropriated money.

Statutes and codes affected: none applicable.

§101.6. Historically Underutilized Business Program.

The State Securities Board adopts by reference the rules established by the General Services Commission relating to the Historically Underutilized Business Program, contained in Title 1, Part 5, Chapter 111, Subchapter B, of the Texas Administrative Code.

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

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TRD-200101680
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-8300

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CHAPTER 107. TERMINOLOGY

7 TAC §107.2

The State Securities Board proposes an amendment to §107.2, concerning definitions, to coordinate with new Chapters 115 and 116, which are being concurrently proposed. Specifically, paragraph (23) is being modified to eliminate "annulment" of a license; the definition of "rendering services as an investment adviser" is being shortened to comport to the equivalent definition contained in the new §116.1(a)(8); and the definition of "solicitor" is being moved to new §116.1(a)(9), eliminating old paragraph (39), and the remaining definitions are being renumbered accordingly.

Michael S. Gunst, Director, Dealer Registration Division, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Gunst 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 that persons seeking guidance about terms used in the Board's rules will find defined terms used consistently throughout. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed amendment affects Texas Civil Statutes, Articles 581-13 through 581-15, 581-17 through 581-19, and 581-25.

§107.2. Definitions.

The following words and terms, when used in Part VII of this title (relating to the State Securities Board), shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(22) (No change.)

(23) Licensing--The process respecting the granting, denial, renewal, revocation, suspension, [~~annulment,~~] withdrawal, or amendment of a license.

(24)-(31) (No change.)

(32) Rendering services as an investment adviser--Any act that results in the providing of investment advisory services for compensation. [~~Any person coming within the designation cannot conduct such activity without first being registered as an investment adviser/dealer under the provisions of the Act or notice-filed under the provisions of §115.1(i) of this title (relating to General Provisions). Likewise, every person employed or appointed, or authorized by such person to render services which include the giving of investment advice cannot conduct such activities unless registered as a dealer/investment adviser, a salesman, or an agent under the provisions of the Act, or notice-filed as a dealer/investment adviser, a salesman, or an agent under the provisions of §115.1(i) of this title.~~]

(33)-(38) (No change.)

[~~(39) Solicitor--Any person or entity who, for compensation, acts as an agent of an investment adviser in referring potential clients.~~]

(39) [~~(40)~~] Staff--Personnel of the Securities Board, excluding the members of the Board, the Securities Commissioner, and the Deputy Commissioner.

(40) [~~(41)~~] State, territory, or insular possession of the United States--As used in the Texas Securities Act, includes a commonwealth.

(41) [~~(42)~~] Statement to reflect the financial condition--A balance sheet.

(42) [~~(43)~~] Telephone or telegram--For purposes of the Texas Securities Act, §7.C(2)(c), includes any means of electronic transmission such as, but not limited to, telephone, telegraph, wireless, graphic scanning, modem, or facsimile; provided, however, that the office of the State Securities Board has the necessary equipment to accept such a transmission.

(43) [~~(44)~~] Within this state--

(A) A person is a "dealer" who engages "within this state" in one or more of the activities set out in the Texas Securities Act, §4.C, if either the person or the person's agent is present in this state or the offeree/purchaser or the offeree/purchaser's agent is present in this state at the time of the particular activity. A person can be a dealer in more than one state at the same time.

(B) Likewise, a person is a "salesman" who engages "within this state" in one or more of the activities set out in the Texas Securities Act, §4.D, whether by direct act or through subagents except as otherwise provided, if either the salesman or the salesman's agent is present in this state or the offeree/purchaser or the offeree/purchaser's agent is present in this state at the time of the particular activity. A person can be a salesman in more than one state at the same time.

(C) Offers and sales can be made by personal contact, mail, telegram, telephone, wireless, electronic communication, or any other form of oral or written communication.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101681
Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8300

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CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION

7 TAC §109.13

The State Securities Board proposes an amendment to §109.13, concerning limited offering exemptions. A provision is being relocated from §115.1(f), which is being concurrently proposed for repeal.

Michael S. Gunst, Director, Dealer Registration Division, and Micheal Northcutt, Director, Securities Registration Division, have determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Gunst and Mr. Northcutt also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that issuers utilizing the exemption provided in §109.13(k) will be apprised of the exemption from dealer and agent registration for their officers, directors, and employees who answer questions about a Regulation D Rule 505 or 506 offering. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendment is proposed under Texas Civil Statutes, Articles 581-28-1, 581-5.T, and 581-12.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.B provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

The proposed amendment affects Texas Civil Statutes, Articles 581-5, 581-7, and 581-12.

§109.13. Limited Offering Exemptions.

(a)-(j) (No change.)

(k) Uniform limited offering exemption. In addition to sales made under the Texas Securities Act, §5.I, the State Securities Board, pursuant to the Act, §5.T, exempts from the registration requirements of the Act, §7, any offer or sale of securities offered or sold in compliance with the Securities Act of 1933, Regulation D, Rules 230.505 and/or 230.506, including any offer or sale made exempt by application of Rule 508(a), as made effective in United States Securities and Exchange Commission Release Number 33-6389 and as amended in Release Numbers 33-6437, 33-6663, 33-6758, and 33-6825, and which satisfies the following further conditions and limitations.

(1)-(16) (No change.)

(17) Issuers in Regulation D offerings. When an offering is made in compliance with Regulation D of the SEC and the offering will be made by or through a registered securities dealer, the issuer and its directors, officers, agents, and employees may make themselves available to answer questions from offerees as required by Rule 502(b)(2)(v) of Regulation D without being required to register as securities dealers, agents, or salesmen under the Act, §12.

(l) (No change.)

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

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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8300

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CHAPTER 115. DEALERS AND SALESMEN

7 TAC §§115.1 - 115.7

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

The State Securities Board proposes the repeal of Chapter 115, consisting of §§115.1-115.7, concerning Dealers and Salesmen. In related rulemaking, the Board is proposing the creation of a new Chapter 115, concerning dealers and agents, and a new Chapter 116, concerning investment advisers and investment adviser representatives.

Michael S. Gunst, Director, Dealer Registration Division, and David Grauer, Director, Enforcement Division, have determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Gunst and Mr. Grauer also have determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be the replacement of the chapter with better organized and more easily understandable provisions. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed repeal in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The repeal is proposed under Texas Civil Statutes, Articles 581-28-1 and 581-12.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12.B provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

The statutes and codes affected by the proposed new chapter are Texas Occupations Code, §53.025, and Texas Civil Statutes, Articles 581-12 through 581-13, 581-15 through 581-21, and 581-25.

§115.1. General Provisions.

§115.2. Application.

§115.3. Examination.

§115.4. Evidences of Registration.

§115.5. Minimum Records.

§115.6. Registration of Persons with Criminal Backgrounds.

§115.7. Maintenance and Inspection of Records.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101683
Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8300

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CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §§115.1 - 115.10

The State Securities Board proposes new chapter 115, consisting of §§115.1-115.10, concerning securities dealers and agents. In related rulemaking, the Board is proposing the concurrent repeal of existing Chapter 115, concerning dealers and salesmen, and the creation of a new Chapter 116, concerning investment advisers and investment adviser representatives.

The new chapter 115 has been substantially reorganized and relates only to dealers and their agents. New §115.1, concerning general provisions, contains definitions; sets forth the registration requirements for dealers, issuers, agents, and branch offices; and sets out the types of registrations.

New §115.2, concerning applications, provides a detailed listing of the documents submitted with applications for dealer and agent registration; clarifies an existing requirement that the designated officer or partner of a dealer must be a control person of the dealer and must complete examination requirements; clarifies that activity at a branch office is not permitted until the location has been approved as a branch; sets out the procedure for requesting registration of a branch office; sets up a 10-day grace period to designate a replacement branch office manager, rather than requiring it immediately as is the case under the existing rules; provides for the automatic withdrawal and abandonment of dealer and agent registration applications; and provides for filing through the Central Registration Depository System.

New §115.3, concerning examinations, sets forth examination requirements and waivers therefrom.

New §115.4, concerning evidences of registration, provides for the issuance of an evidence of registration or certificate or registration, when an amendment is required, termination of agents, and renewal procedures. It also sets out a new procedure regarding successor entities. The existing rule requires a request to obtain a temporary registration. The new rule makes the temporary registration automatic. An extension of the automatic temporary registration may be granted by the Securities Commissioner on request.

New §115.5, concerning minimum records, sets out the records to be maintained by dealers, the retention periods for those records, and provides for the Commissioner's review of records.

New §115.6, concerning registration of persons with criminal backgrounds, contains rulemaking required by the Texas Occupations Code, §53.025. It sets out the factors for determining when a misdemeanor conviction directly relates to the duties

and responsibilities of the applicant or registrant and matters to be considered in determining an applicant's fitness following a felony or misdemeanor conviction. Separate and apart from the provisions of this rule, the Texas Securities Act, §14, permits denial, suspension, or revocation of a license for any felony, not just ones that are directly related to the duties and responsibilities of the licensee.

New §115.7, concerning maintenance and inspection of records, codifies the agency's long-standing position that immediate access is required to all records kept in the normal course of the dealer's business, not just those records that are required to be kept pursuant to Board rules.

New §115.8, concerning fee requirements, contains provisions related to determining the appropriate filing fee and, when appropriate, applying for a reduction in fees.

New §115.9, concerning post registration reporting requirements, sets out the events that a registered dealer must report to the Securities Commissioner. Its provisions are based on current Form U-4 reporting requirements.

New §115.10, concerning supervisory requirements, requires each dealer to establish and maintain a system to supervise the activities of its agents. The provision is reflective of requirements imposed by the National Association of Securities Dealers.

Michael S. Gunst, Director, Dealer Registration Division, and David Grauer, Director, Enforcement Division, have determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Gunst and Mr. Grauer also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to apprise dealers and their agents of their obligations under the Texas Securities Act and Board rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed sections in the *Texas Register.* Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The new rules are proposed under Texas Civil Statutes, Articles 581-28-1 and 581-12.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12.B provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

The statutes and codes affected by the proposed new chapter are Texas Occupations Code, §53.025, and Texas Civil Statutes, Articles 581-12 through 581-13, 581-15 through 581-19, and 581-25.

§115.1. General Provisions.

(a) Definitions. Words and terms used in this chapter are also defined in §107.2 of this title (relating to Definitions). The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A person who submits an application for registration as a dealer or an agent.

(2) Branch office--Each office in Texas in which either records are maintained or control over and review of the activities of registered persons exists.

(3) Branch office manager--The person named by a dealer to supervise the activities of a branch office.

(4) Control--The possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or company, whether through the ownership of voting securities, by contract, or otherwise.

(5) In this state--As used in the Texas Securities Act, §12, has the same meaning as the term "within this state" as defined in §107.2 of this title (relating to Definitions) and paragraph (8) of this subsection.

(6) NASDR--The National Association of Securities Dealers Regulation, Inc.

(7) Officer--A president, vice president, secretary, treasurer, or principal financial officer, comptroller, or principal accounting officer, or any other person occupying a similar status or performing similar functions with respect to any organization or entity, whether incorporated or unincorporated.

(8) Within this state--

(A) A person is a "dealer" who engages "within this state" in one or more of the activities set out in the Texas Securities Act, §4.C, if either the person or the person's agent is present in this state or the offeree/purchaser or the offeree/purchaser's agent is present in this state at the time of the particular activity. A person can be a dealer in more than one state at the same time.

(B) Likewise, a person is an "agent" who engages "within this state" in one or more of the activities set out in the Texas Securities Act, §4.D, whether by direct act or through subagents except as otherwise provided, if either the person or the person's agent is present in this state or the offeree/purchaser or the offeree/purchaser's agent is present in this state at the time of the particular activity. A person can be an agent in more than one state at the same time.

(C) Offers and sales can be made by personal contact, mail, telegram, telephone, wireless, electronic communication, or any other form of oral or written communication.

(b) Registration Requirements of Dealers, Issuers, Agents, and Branch Offices.

(1) Requirements of registration.

(A) No dealer, issuer, or agent of a dealer or issuer shall sell or offer for sale any securities within this state without first being registered as a dealer or agent, or exempt from registration.

(B) Each branch office in Texas must be registered. A registered officer, partner, or agent must be named as branch office manager.

(2) Persons not required to register as an agent.

(A) Registration as an agent is not required for a person, associated with a dealer registered in Texas, who effects a transaction pursuant to the Securities Exchange Act of 1934, §15(h)(3), provided such person is:

(i) not ineligible to register with this state for any reason other than such a transaction; and

(ii) registered with a registered securities association and at least one other state.

(B) For purposes of this paragraph, a person is "ineligible to register with this state," if the person:

(i) has been convicted of a securities-related felony; or

(ii) has been convicted of a theft-related felony.

(C) For purposes of this paragraph, a "registered securities association" is one currently recognized as such by the SEC pursuant to the Securities Exchange Act of 1934, §15A.

(D) Persons not required to register with the Securities Commissioner pursuant to subparagraph (A) of this paragraph, are reminded that the Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether or not the person engaging in fraud or fraudulent practices is required to be registered. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by a dealer or agent in connection with transactions involving securities in Texas.

(c) Types of registrations.

(1) General registration. A general registration is a registration to deal in all categories of securities, without limitation.

(2) Restricted registration. The restricted registrations are as follows:

(A) registration to deal exclusively in the sale of interests (other than interests in limited partnerships) in oil, gas, and mining leases, fees, or titles or contracts relating thereto;

(B) registration to deal exclusively in municipal securities;

(C) registration to deal exclusively in real estate syndication interests and/or condominium securities, including interests in real estate limited partnerships;

(D) registration to deal exclusively in sales of securities to the dealer's own employees;

(E) registration to deal exclusively in securities issued by open-end investment companies registered under the Texas Securities Act and the Investment Company Act of 1940;

(F) registration for an issuer to deal exclusively in its own securities;

(G) registration to deal exclusively in options on foreign currencies;

(H) registration to deal exclusively in sales of securities in direct participation programs;

(I) registration to deal exclusively in government securities;

(J) registration to accept orders unsolicited by such person from existing customers of the dealer;

(K) registration to deal exclusively in corporate securities;

(L) registration to deal in all general securities except municipal securities; and

(M) registration with other restrictions which the Securities Commissioner may impose based upon the facts.

(3) In restricted registrations, the evidence of registration shall indicate that the holder thereof is entitled to act as a dealer only in the specified issue or category of securities.

§115.2. Application Requirements.

(a) Securities dealer application requirements. A complete application consists of the following and must be filed in paper form with the Securities Commissioner:

(1) Form BD;

(2) Form U-4 for the designated officer and a Form U-4 for each agent to be registered (officers of a corporation or partners of a partnership shall not be deemed agents solely because of their status as officers or partners);

(3) Form 133.16, an agreement for maintenance and inspection of records;

(4) a copy of articles of incorporation, partnership agreement, articles of association, trust agreement, or other documents which indicate the form of organization, certified by the appropriate jurisdiction or by an officer or partner of the applicant;

(5) all foreign corporations and other nonresident applicants must file an irrevocable consent to service of process utilizing Forms U-2 and U-2A, or Form 133.8;

(6) assumed name certificate, if applicable. The improper use by an applicant of an assumed name containing "incorporated," "corporation," "associates," "limited," or an abbreviation of one of those words, may be grounds for denying registration of the applicant if such designation is thereby misleading;

(7) a balance sheet prepared in accordance with generally accepted accounting practices reflecting the financial condition of the dealer as of a date not more than 90 days prior to the date of such filing. The balance sheet should be prepared by independent certified public accountants or independent public accountants, or must instead be attested by the sworn notarized statement of the applicant's principal financial officer. If attested by the principal financial officer of the applicant, such officer shall certify as follows: I am the principal financial officer of (name of dealer). The accompanying balance sheet has been prepared under my direction and control and presents fairly its financial position on the dates indicated to the best of my knowledge, belief, and ability. (Signature and Title).

(8) Form 133.23, a franchise tax certification form;

(9) any other information deemed necessary by the Securities Commissioner to determine a dealer's financial responsibility or a dealer's or agent's business repute or qualifications; and

(10) the appropriate registration fee(s).

(b) Designated officer registration. Dealers must file a Form U-4 application to register an officer or partner in connection with the registration of the dealer. The officer or partner must be a control person of the dealer. The officer or partner must complete the necessary registration and examination requirements. An applicant may designate as its officer or partner a control person registered in Texas via the Central Registration Depository System maintained by the National Association of Securities Dealers. If the officer or partner resigns or is otherwise removed from his or her position, the firm shall make an application to register another officer or partner within 30 days.

(c) Branch office registration and inspection. A request for registration of a branch office of a dealer may be made upon initial application of the dealer or by amendment to a current registration. No sales-related activity may occur in any branch office location until

such time as the dealer receives notification from the Securities Commissioner that such location has been approved as a branch office. The request for registration of a branch office may be made in letter form or by the submission of Schedule E of Form BD. The fee for registration of each branch office is $25. Simultaneous with the request for registration of a branch office, a branch office manager must be designated. The manager must satisfy the examination qualifications required of the dealer before the branch office may be registered. A branch office manager is not required to be registered as a NASD principal, but must be registered in Texas as an agent and is responsible for supervision of the activities of the branch office. Within 10 business days from when a branch office manager ceases to be employed or registered in such capacity by the dealer, a new branch office manager, qualified by passage of the appropriate examinations, must be designated. Absent the designation of a new branch manager to the Securities Commissioner within the 10 business day period, the registration of a branch office whose manager ceases to be employed as such by a dealer may be automatically terminated. The branch office registration may be reinstated upon the designation of a qualified branch office manager and payment of the branch office registration fee. Each branch office registered with the Securities Commissioner is subject to unannounced inspections at any time during normal business hours.

(d) Withdrawal and abandonment of a dealer or agent initial application for registration.

(1) Any initial application for dealer or agent registration that fails to meet registration requirements within six months of the filing date of the application will be considered withdrawn. A copy of this subsection will be mailed to the applicant at least 30 days prior to the withdrawal of the application pursuant to this subsection.

(2) If an applicant for registration with the Securities Commissioner as a dealer or agent fails to make any type of response to the most recent written request for information relating to an application that has been pending for six months, the application will be considered withdrawn. This withdrawal will occur automatically if the applicant fails to respond to the most recent written request for information sent by certified mail to the applicant's address as set forth in the application. This certified written request shall inform the applicant that the application will be considered withdrawn if a response to the request for information is not received within 30 days from the date of the certified letter. A copy of this subsection and the most recent written request for information will be included with the certified letter.

(e) Central Registration Depository System (CRD).

(1) Whenever the Texas Securities Act or Board rules require the filing of an application with the Securities Commissioner for dealer or agent registration, members of the National Association of Securities Dealers, Inc. (NASD) or applicants for membership in the NASD shall make such filing electronically through the CRD which is jointly operated by the NASD and the North American Securities Administrators Association, Inc. (NASAA). Applicants shall use the applicable uniform form for the submission of the filing in question and shall supplement their electronic filing by filing, in paper form, the items listed in paragraphs (3)-(10) of subsection (a) of this section, directly with the Commissioner. With regard to the items listed in paragraphs (1) and (2) of subsection (a) of this section, only page 1 of Form BD and page 1 of Form U-4 for designated officer must be filed in paper form directly with the Commissioner.

(2) Uniform forms submitted through the CRD that designate Texas as a jurisdiction in which the filing is to be made are deemed to be filed with the Securities Commissioner and constitute official records of the Board.

§115.3. Examination.

(a) Requirement. To determine the applicant's qualifications and competency to engage in the business of dealing in and selling securities, the State Securities Board requires a written examination on general securities principles and on state securities law. The passing score for all applicants on each examination is 70%.

(b) Examinations accepted.

(1) Each applicant must pass an examination on general securities principles. This requirement may be satisfied by passing an examination on general securities principles administered by the NASD. As set forth in paragraph (3) of this subsection, applicants for restricted registrations may substitute an examination dealing with a particular type of security for an examination on general securities principles.

(2) For purposes of this subsection, the Securities Commissioner recognizes the following general examinations administered by the NASD:

(A) Series 1 - General Securities Examination;

(B) Series 2 - NASD Non-Member General Securities Examination; and

(C) Series 7 - General Securities Representative Examination.

(3) In lieu of an examination on general securities principles, the Securities Commissioner recognizes the following limited examinations, administered by the NASD, for the corresponding restricted registrations:

(A) for persons seeking a restricted registration to deal exclusively in securities issued by open-end investment companies registered under the Texas Securities Act or the Investment Company Act of 1940, the Series 6 -- Investment Company Products/Variable Contracts Representative Examination;

(B) for persons seeking a restricted registration to accept orders unsolicited by such person from existing customers of the dealer, the Series 11 -- Assistant Representative/Order Processing Examination;

(C) for persons seeking a restricted registration to deal exclusively in direct participation program securities, the Series 22 -- Direct Participation Programs Representative Examination;

(D) for persons seeking a restricted registration to deal exclusively in municipal securities, the Series 52 -- Municipal Securities Representative Examination;

(E) for persons seeking a restricted registration to deal exclusively in corporate securities, the Series 62 -- Corporate Securities Representative Examination;

(F) for persons seeking a restricted registration to deal in all general securities except municipal securities, either the Series 17 -- General Securities Representative Examination, the Series 37 -- General Securities Representative Examination, the Series 38 -- General Securities Representative Examination, or the Series 47 -- General Securities Representative Examination; and

(G) for persons seeking a restricted registration to deal exclusively in government securities, the Series 72 -- Government Securities Representative Examination. A person registered on or before September 1, 1998 for the purpose of dealing exclusively in government securities is not required to pass the Series 72 examination.

(4) Each applicant must pass an examination on state securities law. This requirement may be satisfied by passing an examination on the Texas Securities Act administered by this Agency or by passing

the Uniform Securities Agent State Law Examination (Series 63) or the Uniform Combined State Law Examination (Series 66).

(c) Waivers of examination requirements.

(1) All persons who were registered in Texas on August 23, 1963, are not required to take any examinations.

(2) A full waiver of the examination requirements of the Texas Securities Act, §13.D, is granted by the Board to the following classes of persons:

(A) issuers offering securities in rights offerings to their own securities holders;

(B) issuers offering their own securities in exchange for outstanding securities of another corporation, provided consummation of the offer is dependent upon tender of at least 80% of such outstanding securities;

(C) issuers restricting distribution of securities to security holders of an affiliate company, a subsidiary, or a parent of the issuer, provided the registration certificate is issued on a temporary basis and terminated immediately after the offering;

(D) officers and employees whose firms restrict their officers' and employees' securities activities to acting as brokers between and among principals for the sale of a majority of the stock or equity securities of a privately held business pursuant to a privately negotiated purchase agreement, where the managerial control of the business will devolve upon the purchaser(s) and where compensation received by the firm will be payable for the brokerage activities only; and

(E) a person who completed the examinations required under this subsection, but whose registration has lapsed for more than two years and who has been continually employed in a securities-related position with an entity which was not required to be registered.

(3) A partial waiver of the examination requirements of the Texas Securities Act, §13.D, is granted by the Board to the following classes of persons:

(A) applicants who have been continuously registered with the Securities and Exchange Commission, National Association of Securities Dealers, New York Stock Exchange, or any other exchange listed in §6.F of the Texas Securities Act or recognized by the Board pursuant to §111.2 of the rules for 10 years immediately preceding the application for registration in Texas. These applicants are required to pass an examination on state securities law as required by subsection (b)(4) of this section;

(B) applicants who passed the "state securities examination" promulgated and formerly administered by the Psychological Corporation, New York, New York, now the Psychological Corporation, San Antonio, Texas, which was an examination on general securities principles. These applicants are required to pass an examination on state securities law as required by subsection (b)(4) of this section;

(C) applicants seeking registration for the purpose of dealing exclusively in real estate syndication interests or condominium securities, provided such persons are licensed, at the time of application, under the Real Estate License Act (Texas Civil Statutes, Article 6573a et seq.). Such persons are not required to take a general securities examination, but are required to pass an examination on state securities law as required by subsection (b)(4) of this section;

(D) applicants seeking registration for the purpose of dealing exclusively in oil and gas interests (other than interests in limited partnerships). Such persons are not required to take the general securities examination, but are required to pass an examination on state securities law as required by subsection (b)(4) of this section. Provided, however, any persons registered prior to January 1, 1976, for the purpose of dealing exclusively in oil and gas interests, are not required to pass an examination; and

(E) applicants who are officers, partners, or employees of an issuer (other than an open-end investment company) if the issuer's securities will be registered for sale in Texas. Such officers, partners, and employees are not required to take the general securities examination, but are required to pass an examination on state securities law as required by subsection (b)(4) of this section. Evidences of registration granted pursuant to this subparagraph are restricted to sales of the currently registered securities of the issuer. Such evidences of registration must be surrendered to the State Securities Board for cancellation immediately upon completion of the distribution of securities for which the securities and dealer registrations have been obtained.

(4) The Securities Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §13.D.

(d) Texas Securities Law Examination.

(1) The fee for each filing of a request to take the Texas securities law examination is $35. An admission letter issued by the Board is required for all entrants. The examination is given at 9:00 a.m. on each Tuesday at the office of the State Securities Board in Austin. The examination may be taken at other locations near principal population centers across the state. Testing centers require reservations and may charge an additional (monitor) fee for administering the examination. A list of examination centers with additional details may be obtained from the State Securities Board.

(2) While taking the examination on the Texas Securities Act, each applicant may use an unmarked copy of the Texas Securities Act as it is printed and distributed by the State Securities Board. No other reference materials are allowed to be used by applicants during the examination.

(3) Reexamination. An applicant who fails the examination on the Texas Securities Act may request reexamination. The applicant must bring his or her application up to date before retaking an examination.

§115.4. Evidences of Registration.

(a) Issuance. An evidence of registration or certificate of registration shall be issued for each registered securities dealer reflecting the registered officer or partner. An evidence of registration shall be issued for each registered branch office reflecting the registered branch office manager.

(b) Amendments and successor entities.

(1) Any changes in the information reflected on the evidence of registration must be submitted to the Securities Commissioner within 30 days of such change, in order that amendments may be made to the evidence of registration or certificate of registration. The fee for filing to amend the evidence of registration is $25.

(2) Structural changes to a currently registered securities dealer, including reorganizations, mergers, or consolidations, that result in a surviving entity that is not currently registered, will require the filing of a new application and fees for registration. Upon registration of the surviving entity, the registration of the predecessor securities dealer will be terminated.

(3) The application for the successor entity should be filed far enough in advance that the application can be reviewed and approved prior to the successor entity taking over the business of the registered dealer. If a successor entity has taken over the business of a

registered dealer before the application of the successor entity has been reviewed and approved, the registration of the successor entity will be automatically granted a temporary registration for 60 days from the date of succession to complete the registration for the new entity. If the successor entity fails to complete the registration requirements within the 60-day temporary registration period, it may submit a written request to the Securities Commissioner to grant an extension of the temporary registration for up to 30 additional days. If the Commissioner, in the exercise of his or her discretion, declines to grant the extension request, the registration will terminate for the dealer and all its agents on the expiration of the 60-day temporary registration. Any sales by the dealer and/or its agents after termination of the temporary registration are subject to the sanctions provided by the Texas Securities Act for selling securities while unregistered. An additional fee of $25, as required in paragraph (1) of this subsection, must be submitted since it will involve an amendment to the evidence of registration if the application is approved.

(c) Termination. A securities dealer is required to notify the Securities Commissioner upon termination of any registered agent from its employ. Upon receipt of such notification, the Commissioner may terminate the registration. Dealers who are members of the NASD must file through the CRD a Form U-5, Uniform Termination Notice for Securities Industry Registration, to comply with this subsection.

(d) Renewal.

(1) Procedures for renewing expired and unexpired registrations are set forth in the Texas Securities Act, §19.C.

(2) A notice of impending expiration of registration (renewal application) will be sent to a currently registered dealer at least 30 days before the expiration of its registration. The renewal application should be returned to the State Securities Board for processing, along with the appropriate fee.

(3) If a person's registration is not renewed in a timely manner because such person is or was on active duty with the armed forces of the United States of America serving outside Texas, such person may renew the registration pursuant to this paragraph.

(A) Renewal of the registration may be requested by such person, such person's spouse, or an individual having power of attorney from such person. The renewal application shall include a current address and telephone number for the individual requesting the renewal.

(B) Renewal may be requested before or after expiration of the registration.

(C) A copy of the official orders or other official military documentation showing that such person is or was on active duty serving outside Texas shall be submitted to the Securities Commissioner along with the renewal application.

(D) A copy of the power of attorney from such person, if any, shall be filed with the Securities Commissioner along with the renewal application if the individual having the power of attorney executes any of the documents required in this paragraph.

(E) A renewal application submitted to the Securities Commissioner pursuant to this paragraph shall be accompanied by the applicable renewal fee set out in §115.8 of this title (relating to Fee Requirements).

(F) The State Securities Board will not assess any increased fee or other penalty against the person for failure to timely renew such person's registration if such person establishes to the satisfaction of the Securities Commissioner that all requirements of this paragraph have been met.

§115.5. Minimum Records.

(a) Dealer records. Compliance with the record-keeping requirements of the United States Securities and Exchange Commission, found in 17 Code of Federal Regulations §240.17a-3 and §240.17a-4, will satisfy the requirements of this section.

(b) Records to be made by certain dealers. A person or company registered in Texas as a general securities dealer or a dealer in municipal securities shall make and keep current the following minimum records or the equivalent thereof.

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash, and other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered.

(2) Ledgers (or other records) that reflect all assets and liabilities, income and expense, and capital accounts.

(3) Ledger accounts (or other records) itemizing separately as to each cash and margin account of every customer and of such dealer and its partners, all purchases, sales, receipts, and deliveries of securities and commodities for such account and all other debits and credits to such account.

(4) Ledgers (or other records) that reflect the following:

(A) securities in transfer;

(B) dividends and interest received;

(C) securities borrowed and securities loaned;

(D) monies borrowed and monies loaned (together with a record of the collateral therefor and any substitutions in such collateral); and

(E) securities failed to receive and failed to deliver.

(5) A securities record or ledger that reflects separately for each security as of the clearance dates all "long" or "short" positions (including securities in safekeeping) carried by such dealer for his account or for the account of his customers or partners and showing the location of all securities long and the offsetting position of all securities short, including long security count differences and short security count differences classified by the date of the physical count and verification in which they were discovered, and in all cases the name or designation of the account in which each position is carried.

(6) A memorandum of each brokerage order and of any other instruction given or received for the purchase or sale of securities, whether executed or unexecuted. Such memorandum shall show the terms and conditions of the order or instructions and of any modifications or cancellation thereof, the account for which entered, the time of entry, the price at which executed, and, to the extent feasible, the time of execution or cancellation. Orders entered pursuant to the exercise of discretionary power by such dealer or any of its employees shall be so designated. The term "instruction" shall be deemed to include instructions between partners and employees of a dealer. The term "time of entry" shall be deemed to mean the time when such dealer transmits the order or instruction for execution or, if it is not so transmitted, the time when it is received.

(7) A memorandum of each purchase and sale for the account of such dealer showing the price, and, to the extent feasible, the time of execution; and, in addition, where such purchase or sale is with

a customer other than a broker or dealer, a memorandum of each order received, showing the time of receipt, the terms and conditions of the order, and the account in which it was entered.

(8) Copies of confirmations of all purchases and sales of securities and copies of notices of all other debits and credits for securities, cash, and other items for the account of customers and partners of such dealer.

(9) A record in respect of each cash and margin account with such dealer containing the name and address of the beneficial owner of such account and, in the case of a margin account, the signature of such owner; provided that, in the case of a joint account or an account of a corporation, such records are required only in respect of the person or persons authorized to transact business for such account.

(10) A record of all puts, calls, spreads, straddles, standby commitments, and other options in which such dealer has any direct or indirect interest or which such dealer has granted or guaranteed, containing at least an identification of the security and the number of units involved.

(11) A questionnaire or application for employment executed by each partner, officer, director, agent, trader, manager, and each employee who handles funds or securities or who solicits transactions or accounts for such dealer, which questionnaire or application shall be approved in writing by an authorized representative of such dealer and shall contain at least the following information with respect to such person (in the case of persons registered with the State Securities Board, a copy of their application for registration as an agent, officer, or partner will satisfy this requirement):

(A) name, address, social security number, and the starting date of employment or other association with the dealer;

(B) date of birth;

(C) the educational institutions attended and whether he or she graduated therefrom;

(D) a complete, consecutive statement of all business connections for at least the preceding 10 years, including the reason for leaving each prior employment, and whether the employment was part-time or full-time;

(E) a record of any denial, suspension, expulsion, or revocation of membership or registration of any dealer he or she was associated with in any capacity when such action was taken;

(F) a record of any denial of membership or registration, and of any disciplinary action taken, or sanction imposed, on the person by any federal or state agency, or by any national securities exchange or national securities association, including any finding that he or she was a cause of any disciplinary action or had violated any law;

(G) a record of any permanent or temporary injunction entered against the person or any dealer he or she was associated with in any capacity at the time such injunction was entered;

(H) a record of any arrest or indictment for any felony or misdemeanor, and the disposition of any such arrest or indictment or further explanation thereof, and a record of any conviction for any felony or any misdemeanor, except minor traffic offenses, of which he has been the subject; and

(I) a record of any other name or names he or she has been known by or has used.

(c) Exemptions from the requirements of subsection (b) of this section:

(1) A dealer is not required to make or keep such records of transactions cleared for such dealer by a member of the National Association of Securities Dealers, Inc., the American Stock Exchange, the Boston Stock Exchange, the Chicago Stock Exchange, the New York Stock Exchange, the Pacific Stock Exchange, the Chicago Board Options Exchange, or any other recognized and responsible stock exchange approved by the Securities Commissioner pursuant to the Texas Securities Act, §6.F, where such records are customarily made and kept by the clearing member.

(2) A dealer is not required to make or keep such records that reflect the sale of United States Tax Savings Notes, United States Defense Savings Stamps, or United States Defense Savings Bonds, Series E, F, and G.

(3) A dealer is not required to make or keep such records with respect to any cash transaction of $100 or less involving only subscription rights or warrants which by their terms expire within 90 days after the issuance thereof.

(4) For purposes of transactions in municipal securities by municipal securities dealers, compliance with Rule G-8 of the Municipal Securities Rulemaking Board will be deemed to be in compliance with subsection (b) of this section.

(d) Restricted dealers. Dealers registered in restricted categories, other than municipal securities dealers, such as oil and gas dealers and real estate dealers, etc., shall keep and maintain records adequate to accurately reflect customer transactions, and the dealer's financial condition. Compliance with the record-keeping requirements of the United States Securities and Exchange Commission, found in 17 Code of Federal Regulations §240.17a-3 and §240.17a-4, will satisfy the requirements of this section; provided such dealers shall maintain at least the following information:

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash, and other debits and credits. Such records shall show the account for which each such transaction was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any), the trade date, and the name or other designation of the person from whom purchased or received or to whom sold or delivered;

(2) Ledgers (or other records) that reflect all assets and liabilities, income and expense, and capital accounts; and

(3) A questionnaire or application for employment executed by each partner, officer, director, agent, trader, manager, and each employee who handles funds or securities or who solicits transactions or accounts for such dealer, which questionnaire or application shall be approved in writing by an authorized representative of such dealer and shall contain at least the following information with respect to such person (in the case of persons registered with the State Securities Board, a copy of their application for registration as an agent, officer, or partner will satisfy this requirement):

(A) name, address, social security number, and the starting date of employment or other association with the dealer;

(B) date of birth;

(C) the educational institutions attended and whether he or she graduated therefrom;

(D) a complete, consecutive statement of all business connections for at least the preceding 10 years, including the reason for leaving each prior employment, and whether the employment was part-time or full-time;

(E) a record of any denial, suspension, expulsion, or revocation of membership or registration of any dealer he or she was associated with in any capacity when such action was taken;

(F) a record of any denial of membership or registration, and of any disciplinary action taken, or sanction imposed, on the person by any federal or state agency, or by any national securities exchange or national securities association, including any finding that he or she was a cause of any disciplinary action or had violated any law;

(G) a record of any permanent or temporary injunction entered against the person or any dealer he or she was associated with in any capacity at the time such injunction was entered;

(H) a record of any arrest or indictment for any felony or misdemeanor, and the disposition of any such arrest or indictment or further explanation thereof, and a record of any conviction for any felony or any misdemeanor, except minor traffic offenses, of which he has been the subject; and

(I) a record of any other name or names he or she has been known by or has used.

(e) Records to be preserved by dealers.

(1) Persons subject to subsection (b) of this section shall preserve:

(A) all records required to be made pursuant to paragraphs (1), (2), (3), and (5) of subsection (b) of this section for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an easily accessible place;

(B) all records required to be made pursuant to paragraphs (4) and (6)-(10) of subsection (b) of this section for a period of not less than three years from the end of the fiscal year during which the last entry was made on such record, the first two years in an easily accessible place; and

(C) all records required to be made pursuant to paragraph (11) of subsection (b) of this section until at least three years following termination of the employment or other relationship between the dealer and the person to whom the records relate.

(2) Persons subject to subsection (d) of this section shall preserve all records required to be made pursuant to subsection (d) of this section for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an easily accessible place.

(3) Persons registered as dealers in Texas, including restricted dealers, shall preserve for a period of not less than three years from the end of the fiscal year during which the last entry was made on such record, the first two years in an easily accessible place:

(A) all checkbooks, bank statements, cancelled checks, and cash reconciliations;

(B) all bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of the dealer, as such;

(C) originals of all communications received and copies of all communications sent by the dealer (including interoffice memoranda and communications) relating to the business of the dealer;

(D) all trial balances, financial statements, branch office reconciliations, and internal audit working papers relating to the business of the dealer;

(E) all guarantees of accounts and all powers of attorneys and other evidence of the granting of any discretionary authority given in respect of any account, and copies of resolutions empowering an agent to act on behalf of a corporation;

(F) all written agreements (or copies thereof) entered into by the dealer relating to the business of the dealer, including agreements with respect to any account; and

(G) all customer complaints received by the dealer relating to the business of the dealer, and all documents relating to such complaints; and

(H) all information including but not limited to offering materials and subscription agreements on any private placements offered by the dealer.

(4) Persons registered as dealers in Texas shall preserve for a period of not less than five years from the end of the fiscal year during which a customer's account was closed, any account cards or records which relate to the terms and conditions with respect to the opening and maintenance of such account.

(5) Persons registered as dealers in Texas shall preserve for at least three years after the termination of the enterprise partnership articles and any amendments thereto, articles of incorporation, charters, minute books, and stock certificate books of the dealer and of any predecessor.

(6) The records required to be maintained and preserved pursuant to this section may be immediately produced or reproduced on microfilm or other photograph and may be maintained and preserved for the required time in that form provided that such microfilms or other photographs are arranged and indexed in such a manner as to permit the immediate location of any particular document, and that such microfilms or other photographs are at all times available for inspection by representatives of the Securities Commissioner together with facilities for immediate, easily readable projection of the microfilm or other photograph and for the production of easily readable facsimile enlargements.

(7) If a person ceases to be registered as a dealer in Texas, such person shall for the remainder of the periods of time specified in this section continue to preserve the records required herein.

(8) For purposes of transactions in municipal securities by municipal securities dealers, compliance with Rule G-9 of the Municipal Securities Rulemaking Board will be deemed to be compliance with this subsection.

(9) The records required to be maintained pursuant to this section may be maintained by any electronic storage media available so long as such records are available for immediate free access by representatives of the Securities Commissioner. Any electronic storage media must preserve the records exclusively in a non-rewriteable, non-erasable format; verify automatically the quality and accuracy of the storage media recording process; serialize the original and, if applicable, duplicate units of storage media, and time-date for the required period of retention the information placed on such electronic storage media; and have the capacity to download indexes and records preserved on electronic storage media to an acceptable medium. In the event that a records retention system commingles records required to be kept under this section with records not required to be kept, representatives of the Securities Commissioner may review all commingled records.

(f) The Securities Commissioner has a right to review all records maintained by registered dealers regardless of whether such records are required to be maintained under any specific applicable rule provision.

§115.6. Registration of Persons with Criminal Backgrounds.

(a) An application for registration may be denied, or a registration may be revoked or suspended, if the Securities Commissioner finds that the person has been convicted of any felony, or of a misdemeanor offense that directly relates to its duties and responsibilities. In determining whether a misdemeanor directly relates to such duties and responsibilities, the Securities Commissioner shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes for requiring registration of dealers and agents;

(3) the extent to which the registration applied for might offer an opportunity to engage in further criminal activity of the same type as that in which the applicant previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a registered dealer or agent.

(b) The Securities Commissioner shall consider the following evidence in determining the present fitness of an applicant who has been convicted of a crime:

(1) The extent and nature of the person's past criminal activity.

(2) The age of the applicant at the time of the commission of the crime.

(3) The amount of time that has elapsed since the applicant's last criminal activity.

(4) The conduct and work activity of the applicant prior to and following the criminal activity.

(5) Evidence of the applicant's rehabilitation or rehabilitative effort while incarcerated or following release.

(6) Other evidence of the applicant's present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the applicant; the sheriff and chief of police in the community where the applicant resides; and any other persons in contact with the applicant.

(7) It shall be the responsibility of the applicant to the extent possible to secure and provide to the Securities Commissioner the recommendation of the prosecution, law enforcement, and correctional authorities as required under this section. The applicant shall also furnish proof to the Securities Commissioner that he or she has maintained a record of steady employment and has supported his or her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted.

(c) The State Securities Board considers that the following misdemeanors directly relate to the duties and responsibilities of securities dealers and agents:

(1) any criminal violation of which fraud is an essential element or that involves wrongful taking or possession of property or services;

(2) any criminal violation of the securities laws or regulations of this state, or of any other state in the United States, or of the United States, or any foreign jurisdiction;

(3) any criminal violation of statutes designed to protect consumers against unlawful practices involving insurance, securities, commodities or commodity futures, real estate, franchises, business opportunities, consumer goods, or other goods and services; and

(4) any criminal violation involving an assault on a person.

§115.7. Maintenance and Inspection of Records.

(a) All records required to be maintained by registered dealers shall be maintained at the location designated in Form 133.16 and at other locations registered as branch offices with the Securities Commissioner.

(b) The Securities Commissioner or his or her authorized representative may conduct on-site inspections of registered dealers without notice and shall be entitled to immediate and free access to all records, required to be maintained pursuant to Board rules or maintained in the normal course of business of the dealer, and to all locations where such records are kept. The Commissioner or his or her authorized representative shall be permitted to make photostatic or computer copies of such records.

(c) In the alternative, the Securities Commissioner or his or her authorized representative may require that all records required to be maintained pursuant to Board rules or maintained in the normal course of business of the dealer be made available in any office of the State Securities Board designated by the Commissioner or his or her representative within 48 hours of a request or within a greater time period as the Commissioner or his or her authorized representative deems reasonable.

§115.8. Fee Requirements.

(a) Registration and notice filing fees. Registration and notice filing fees are as follows:

(1) Securities Dealer - $275 for original applications and $240 for renewal applications.

(2) Agent, Officer, or Partner of Securities Dealer - $235 for original applications and $220 for renewal applications.

(b) Reduced fees for certain person registered in multiple capacities.

(1) In general. A person may request reduced fees under paragraph (2) of this subsection, provided they are registered or are seeking registration in Texas:

(A) as either an agent of a securities dealer or as a sole proprietor securities dealer; and

(B) as either an investment adviser representative of an investment adviser that has less than five investment adviser representatives or as a sole proprietor investment adviser with less than five investment adviser representatives.

(2) Procedure. Persons meeting the requirements of paragraph (1) of this subsection may request reduced registration fees by filing Form 133.36, Request for Reduced Fees for Certain Persons Registered in Multiple Capacities. Form 133.36 must be filed at the time the original application for investment adviser representative or sole proprietor investment adviser registration is filed, or at least 30 days before the person's existing investment adviser representative or sole proprietor investment adviser registration will expire. On review of Form 133.36, the Securities Commissioner may, in his or her discretion, grant or deny the request for reduced fees or direct the person to supply additional information.

(3) Reduced fees. If the Securities Commissioner grants a person's request, the person must pay all applicable fees for securities agent or dealer registration as specified in the Texas Securities Act, §§35.A, 35.B, and 41(a), but is exempt from the fees specified in the Texas Securities Act, §41(a), in connection with original and renewal

applications for investment adviser representative or sole proprietor investment adviser registration, as applicable at the time Form 133.36 is filed. The reduction in fees granted by the Securities Commissioner under this subsection shall continue in force, without any further filings, as long as a person remains registered in a multiple capacity status.

§115.9. Post-Registration Reporting Requirements.

(a) Each person registered as a securities dealer shall report to the Securities Commissioner within 30 days after its entry against the registered person or an agent thereof, the matters described in this subsection. Likewise, each person registered as an agent of a securities dealer shall report to the Commissioner within 30 days after its occurrence or entry against the agent the matters described in this subsection. The following matters must be reported:

(1) any administrative order issued by state or federal authorities, which order:

(A) is based upon a finding that such person has engaged in fraudulent conduct; or

(B) was entered after notice and opportunity for a hearing, denying, suspending, or revoking the person's registration as a dealer, agent, investment adviser, or investment adviser representative, or the substantial equivalent of those terms;

(2) any felony criminal action or conviction;

(3) any misdemeanor action or conviction based on fraud, deceit, or wrongful taking of property;

(4) any order, judgment, or decree entered by any court of competent jurisdiction which temporarily or permanently restrains or enjoins such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving any false filing with any state; or which restrains or enjoins such person from activities subject to federal or state statutes designed to protect consumers against unlawful or deceptive practices involving insurance, commodities or commodity futures, real estate, franchises, business opportunities, consumer goods, or other goods and services;

(5) any expulsion, bar, suspension, censure, fine, or penalty imposed by a self-regulatory organization;

(6) any change in any other information previously disclosed to the Securities Commissioner on any application form or filing; and

(7) the filing of any voluntary or involuntary bankruptcy petition.

(b) Upon request by the Securities Commissioner, a securities dealer or agent is required to furnish to the Commissioner copies of the order, conviction, or decrees, or other documents which evidence events disclosable pursuant to subsection (a) of this section.

(c) For purposes of this section, a securities "dealer" shall include any partners, directors, executive officers, or beneficial owners of 10% or more of any class of the equity securities of a registered dealer (beneficial ownership meaning the power to vote or direct the vote of and/or the power to dispose or direct the disposition of such securities).

§115.10. Supervisory Requirements.

(a) Supervisory system. Each dealer shall establish and maintain a system to supervise the activities of its agents that is reasonably designed to achieve compliance with the Texas Securities Act and Board rules. A dealer's supervisory system shall provide, at a minimum, for the following:

(1) the establishment and maintenance of written procedures; and

(2) the appointment of one or more registered agents to carry out the supervisory responsibilities of the dealer.

(b) Written procedures.

(1) Each dealer shall establish, maintain, and enforce written procedures to supervise the activities of its agents that are reasonably designed to achieve compliance with the Texas Securities Act and Board rules.

(2) The dealer's written supervisory procedures shall set forth the supervisory system established by the dealer and shall include the titles and locations of supervisory personnel and the responsibilities of each supervisory person.

(3) The dealer shall maintain on an internal record the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective. Such record shall be preserved by the dealer for a period of not less than three years, the first two years in an easily accessible place.

(4) A current copy of a dealer's written supervisory procedures, or the relevant portions thereof, shall be kept and maintained in each branch office and at each location where supervisory activities are conducted on behalf of the dealer. Each dealer shall amend its written supervisory procedures as appropriate within a reasonable time after changes occur in applicable securities laws and regulations.

(c) Internal inspections. Each dealer shall conduct a review, at least annually, of the businesses in which it engages, which review shall be reasonably designed to assist in detecting and preventing violations of and achieving compliance with applicable securities laws and regulations. The dealer shall document this review and provide the documentation to the Securities Commissioner upon request. Each dealer shall review the activities of each office, including the periodic examination of customer accounts to detect and prevent violations of applicable securities laws and regulations. Each branch office of the dealer shall be inspected according to a cycle which shall be set forth in the dealer's written supervisory and inspection procedures. In establishing such cycle, the dealer shall give consideration to the nature and complexity of the securities activities for which the location is responsible, the volume of business done, and the number of associated persons assigned to the location. Each dealer shall retain a written record of the dates upon which each review and internal inspection is conducted.

(d) Review of transactions and correspondence. Each dealer shall establish and implement procedures for the review and endorsement by a designated supervisor or branch office manager, in writing on an internal record, of all transactions and for the review by a designated supervisor or branch office manager of incoming and outgoing written and electronic correspondence of its registered agents with the public relating to the securities activities of such dealer. Such procedures should be in writing and be designed to reasonably supervise each agent. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to the Securities Commissioner upon request.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101684

Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-8300

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §§116.1 - 116.15

The State Securities Board proposes new Chapter 116, consisting of §§116.1-116.15, concerning investment advisers and investment adviser representatives. In related rulemaking, the Board is proposing the concurrent repeal of existing Chapter 115, concerning dealers and salesmen, and the creation of a new Chapter 115, concerning dealers and agents.

The new chapter 116 relates only to investment advisers and investment adviser representatives. Many of its provisions are derived from existing Chapter 115 provisions covering investment advisers and investment adviser representatives. New §116.1, concerning general provisions, contains definitions; sets forth the registration or notice filing requirements for investment advisers, investment adviser representatives, and branch offices; sets forth certain exemptions from registration; and sets out the types of registrations.

New §116.2, concerning application requirements, provides a detailed listing of the documents submitted with applications for investment adviser and investment adviser representative registration; clarifies an existing requirement that the designated officer or partner of an investment adviser must be a control person of the adviser and must complete examination requirements; clarifies that activity at a branch office is not permitted until the location has been approved as a branch; sets out the procedure for requesting registration of a branch office; sets up a 10-day grace period to designate a replacement branch office manager, rather than requiring it immediately as is the case under the existing rules; provides for the automatic withdrawal and abandonment of investment adviser and investment adviser representative registration applications; and provides for filing through the Investment Adviser Registration Depository System.

New §116.3, concerning examinations, sets forth examination requirements and waivers therefrom.

New §116.4, concerning evidences of registration, provides for the issuance of an evidence of registration or certificate or registration, when an amendment is required, termination of representatives, and renewal procedures. It also sets out a new procedure regarding successor entities. The existing rule requires a request to obtain a temporary registration. The new rule makes the temporary registration automatic. An extension of the automatic temporary registration may be granted by the Securities Commissioner on request.

New §116.5, concerning minimum records, sets out the records to be maintained by investment advisers, the retention periods for those records, and provides for the Commissioner's review of records.

New §116.6, concerning registration of persons with criminal backgrounds, contains rulemaking required by the Texas Occupations Code, §53.025. It sets out the factors for determining when a misdemeanor conviction directly relates to the duties and responsibilities of the applicant or registrant and matters to be considered in determining an applicant's fitness following a felony or misdemeanor conviction. Separate and apart from the provisions of this rule, the Texas Securities Act, §14, permits denial, suspension, or revocation of a license for any felony, not just ones that are directly related to the duties and responsibilities of the licensee.

New §116.7, concerning maintenance and inspection of records, codifies the agency's long-standing position that immediate access is required to all records kept in the normal course of the investment adviser's business, not just those records that are required to be kept pursuant to Board rules.

New §116.8, concerning fee requirements, contains provisions related to determining the appropriate filing fee and, when appropriate, applying for a reduction in fees.

New §116.9, concerning post registration reporting requirements sets out the events that a registered investment adviser must report to the Securities Commissioner. These requirements are based on current Form U-4 reporting requirements and are currently imposed on investment advisers and investment adviser representatives.

New §116.10, concerning supervisory requirements, requires each investment adviser to establish and maintain a system to supervise the activities of its investment adviser representatives.

New §116.11, concerning disclosure requirement/brochure rule, sets out the written disclosure statement all registered investment advisers must deliver to all clients or prospective clients. Its provisions are almost identical to the current requirements contained in existing §115.2(c).

New §116.12, concerning advisory contract requirements, sets out provisions required in advisory contracts. Its provisions are almost identical to the current requirements contained in existing §115.2(c).

New §116.13, concerning advisory fee requirements, sets out disclosures about and limitations on fees. It generally tracks requirements imposed by the Securities and Exchange Commission ("SEC") in Rule 205-3.

New §116.14, concerning prevention and misuse of nonpublic information, reflects provisions in the federal Insider Trading Act that are required of investment advisers regulated by the SEC.

New §116.15, concerning advertising restrictions, tracks SEC restrictions on advertising.

Michael S. Gunst, Director, Dealer Registration Division, and David Grauer, Director, Enforcement Division, have determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Gunst and Mr. Grauer also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to apprise investment adviser and investment adviser representatives of their obligations under the Texas Securities Act and Board rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed sections in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The new rules are proposed under Texas Civil Statutes, Articles 581-28-1 and 581-12.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12.B provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

The statutes and codes affected by the proposed new chapter are Texas Occupations Code, §53.025, and Texas Civil Statutes, Articles 581-12 through 581-13, 581-15 through 581-19, and 581-25.

§116.1. General Provisions.

(a) Definitions. Words and terms used in this chapter are also defined in §107.2 of this title (relating to Definitions). The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A person who submits an application for registration as an investment adviser or an investment adviser representative.

(2) Branch office--Each office in Texas in which either records are maintained or control over and review of the activities of registered persons exists.

(3) Branch office manager--The person named by the investment adviser to supervise the activities of a branch office.

(4) Control--The possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person or company, whether through the ownership of voting securities, by contract, or otherwise.

(5) In this state--As used in the Securities Act, §12, has the same meaning as the term "within this state" as defined in §107.2 of this title (relating to Definitions) and paragraph (10) of this subsection.

(6) Investment adviser--Any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include:

(A) a bank, or any bank holding company as defined in the federal Bank Holding Company Act of 1956, which is not an investment company;

(B) any lawyer, accountant, engineer, teacher, or geologist, whose performance of such services is solely incidental to the practice of his or her profession;

(C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor;

(D) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation; or

(E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of Treasury, pursuant to the Securities Exchange Act of 1934, §3(a)(12), as exempted securities for the purposes of that Act.

(7) Investment Adviser Representative--Any person or company employed or appointed or authorized by an investment adviser who, for compensation, solicits clients for the investment adviser or provides investment advice on behalf of the investment adviser to clients of the investment adviser, whether by direct act or through subagents as may be further defined by Board rule; provided that the officers of a corporation or other entity, or partners of a partnership, shall not be deemed investment adviser representatives solely because of their status as officers or partners, where such corporation, entity, or partnership is registered as an investment adviser hereunder.

(8) Rendering services as an investment adviser--Any act that results in the providing of investment advisory services for compensation.

(9) Solicitor--Any investment adviser representative who limits their activities to referring potential clients to an investment adviser for compensation.

(10) Within this state--

(A) A person is an "investment adviser" who engages "within this state" in rendering services as an investment adviser as set out in the Texas Securities Act, §4.C, if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser in more than one state at the same time.

(B) Likewise, a person is an "investment adviser representative" who engages "within this state" in rendering services as an investment adviser as set out in the Texas Securities Act, §4.C, whether by direct act or through subagents except as otherwise provided, if either the person or the person's agent is present in this state or the client/customer or the client/customer's agent is present in this state at the time of the particular activity. A person can be an investment adviser representative in more than one state at the same time.

(b) Registration of investment advisers, investment adviser representatives, and branch offices.

(1) Requirements of registration.

(A) Any person who renders services as an investment adviser, including acting as a solicitor, may not engage in such activity for compensation without first being registered as an investment adviser under the provisions of the Texas Securities Act or notice-filed under the provisions of paragraph (2) of this subsection. Likewise, every person employed or appointed, or authorized by such person to render services, which include the giving of investment advice or acting as a solicitor, cannot conduct such activities unless registered as an investment adviser or an investment adviser representative under the provisions of the Act, or notice-filed as an investment adviser or an investment adviser representative under the provisions of paragraph (2) of this subsection.

(B) Each branch office in Texas must be registered. A registered officer, partner, or investment adviser representative must be named as branch office manager.

(2) Exemption from the registration requirements. The Board pursuant to the Texas Securities Act, §§12.B and 5.T, exempts

from the registration provisions of the Act, §12, persons not required to register as an investment adviser or an investment adviser representative on or after July 8, 1997, by act of Congress in Public Law Number 104-290, Title III.

(A) Registration as an investment adviser is not required for the following:

(i) an investment adviser registered under the Investment Advisers Act of 1940, §203;

(ii) an investment adviser registered with the Securities and Exchange Commission pursuant to a rule or order adopted under the Investment Advisers Act of 1940, §203A(c);

(iii) a person not registered under the Investment Advisers Act of 1940, §203, because such person is excepted from the definition of an investment adviser under the Investment Advisers Act of 1940, §202(a)(11); or

(iv) an investment adviser who does not have a place of business located within this state and, during the preceding 12-month period, has had fewer than six clients who are Texas residents.

(B) Registration as an investment adviser representative of an investment adviser described in subparagraph (A) of this paragraph is not required for an investment adviser representative who does not have a place of business located in Texas but who otherwise engages in the rendering of investment advice in this state.

(C) Notice filing requirements and fees for investment advisers and investment adviser representatives exempted from registration pursuant to this subsection only.

(i) Initially, the provisions of subparagraphs (A) and (B) of this paragraph are available provided that the investment adviser files:

(I) a copy of its current Form ADV as filed with the SEC, if a Form ADV is required to be filed by the investment adviser with the SEC;

(II) a consent to service of process; and

(III) an initial fee equal to the amount that would have been paid had the investment adviser and each investment adviser representative filed for registration in Texas.

(ii) Upon amendment to its Form ADV, the investment adviser files a copy of its amended Form ADV as filed with the SEC, if a Form ADV is required to be filed by the investment adviser with the SEC.

(iii) Annually, the investment adviser files:

(I) a copy of its Form ADV as filed with the SEC, if a Form ADV is required to be filed by the investment adviser with the SEC; and

(II) renewal fees which would have been paid had the investment adviser and each investment adviser representative been registered in Texas.

(D) Persons not required to register with the Securities Commissioner pursuant to subparagraphs (A) and (B) of this paragraph, are reminded that the Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether or not the person engaging in fraud or fraudulent practices is required to be registered. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by a dealer, investment adviser, or investment adviser representative in connection with transactions involving securities in Texas.

(c) Types of registrations.

(1) General registration. A general registration is a registration to render advisory services regarding all categories of securities, without limitation.

(2) Restricted registration. A restricted registration as an investment adviser or as an investment adviser representative may be issued based upon the qualifying examination(s) passed by the investment adviser or investment adviser representative.

(3) In restricted registration, the evidence of registration shall indicate that the holder thereof is entitled to act as an investment adviser, investment adviser representative, or solicitor only in the restricted capacity.

§116.2. Application Requirements.

(a) Investment adviser and investment adviser representative application requirements. A complete application consists of the following and must be filed in paper form with the Securities Commissioner, except in such time as the Investment Adviser Registration Depository System (IARD) becomes available:

(1) Form ADV;

(2) Form U-4 for the designated officer and a Form U-4 for each investment adviser representative or solicitor to be registered;

(3) Form 133.16, an agreement for maintenance and inspection of records;

(4) a copy of articles of incorporation, partnership agreement, articles of association, trust agreement, or other documents which indicate the form of organization, certified by the jurisdiction or by an officer or partner of the applicant;

(5) all foreign corporations and other nonresident applicants must also file an irrevocable written consent to service of process utilizing Forms U-2 and U-2A, or Form 133.8;

(6) assumed name certificate, if applicable. The improper use by an applicant of an assumed name containing "incorporated," "corporation," "limited," or an abbreviation of one of those words, may be grounds for denying registration of the applicant if such designation is thereby misleading;

(7) a balance sheet prepared in accordance with generally accepted accounting practices reflecting the financial condition of the investment adviser as of a date not more than 90 days prior to the date of such filing. The balance sheet should be prepared by independent certified public accountants or independent public accountants, or must instead be attested by the sworn notarized statement of the applicant's principal financial officer. If attested by the principal financial officer of the applicant, such officer shall certify as follows: I am the principal financial officer of (name of investment adviser). The accompanying balance sheet has been prepared under my direction and control and presents fairly its financial position on the dates indicated to the best of my knowledge, belief, and ability. (Signature and Title).

(8) Form 133.23, a franchise tax certification form;

(9) disclosure document or Part II of Form ADV;

(10) a copy of the investment adviser's standard advisory contract;

(11) fee schedule;

(12) any other information deemed necessary by the Securities Commissioner to determine an investment adviser's financial responsibility or an investment adviser's or investment adviser representative's business repute or qualification; and

(13) the appropriate registration fee(s).

(b) Designated officer registration. Investment advisers, other than an individual filing as a sole proprietor, must file a Form U-4 application to register an officer or partner in connection with the registration of the investment adviser. The officer or partner must be a control person of the investment adviser. The officer or partner must complete the necessary registration and examination requirements. If the officer or partner resigns or is otherwise removed from his or her position, the firm shall make an application to register another officer or partner within 30 days.

(c) Branch office registration and inspection. A request for registration of a branch office of an investment adviser may be made upon initial application of the investment adviser or by amendment to a current registration. No investment advisory activity may occur in any branch office location until such time as the investment adviser receives notification from the Securities Commissioner that such location has been approved as a branch office. The request for registration of a branch office may be made in letter form or by the submission such information on the Form ADV. The fee for registration of each branch office is $25. Simultaneous with the request for registration of a branch office, a branch office manager must be named. The manager must satisfy the examination qualifications required of the investment adviser before the branch office may be registered. A branch office manager is responsible for supervision of the activities of the branch office. Within 10 business days from when a branch office manager ceases to be employed or registered in such capacity by the investment adviser, a new branch office manager, qualified by passage of the appropriate examinations, must be named. Absent the designation of a new branch manager to the Commissioner within the 10 business day period, the registration of a branch office whose manager ceases to be employed as such by a investment adviser shall be automatically terminated. The branch office registration may be reinstated upon the designation of a qualified branch office manager and payment of the branch office registration fee. Each branch office registered with the Commissioner is subject to unannounced inspections at any time during normal business hours.

(d) Withdrawal and abandonment of an investment adviser or investment adviser representative initial application for registration.

(1) Any initial application for investment adviser or investment adviser representative registration that fails to meet registration requirements within six months of the filing date of the application will be considered withdrawn without prejudice. A copy of this subsection will be mailed to the applicant at least 30 days prior to the withdrawal of the application pursuant to this subsection.

(2) If an applicant for registration with the Securities Commissioner as an investment adviser or investment adviser representative fails to make any type of response to the most recent written request for information relating to an application that has been pending for six months, the application will be considered withdrawn. This withdrawal will occur automatically if the applicant fails to respond to the most recent written request for information sent by certified mail to the applicant's address as set forth in the application. This certified written request shall inform the applicant that the application will be considered withdrawn if a response to the request for information is not received within 30 days from the date of the certified letter. A copy of this subsection and the most recent written request for information will be included with the certified letter.

(e) Investment Adviser Registration Depository (IARD).

(1) Whenever the Texas Securities Act or Board rules require the filing of an application with the Securities Commissioner for investment adviser or investment adviser representative registration such application must be filed electronically via the IARD, which is jointly operated by the NASD, the North American Securities Administrators Association, Inc. (NASAA), and the Securities and Exchange Commission (SEC). Applicants shall use the applicable uniform forms for the submission of the filing in question and shall supplement their electronic filing by filing, in paper form, the items listed in paragraphs (3)-(12) of subsection (a) of this section, directly with the Commissioner.

(2) Uniform forms submitted through the IARD that designate Texas as a jurisdiction in which the filing is to be made are deemed to be filed with the Securities Commissioner and constitute official records of the Board.

(f) Implementation of IARD.

(1) All investment advisers registered with the Securities Commissioner as of July 31, 2001, must make a transitional filing with the IARD no later than August 1, 2001.

(2) All investment advisers seeking registration with the Securities Commissioner after August 1, 2001, must file Part I of Form ADV and the filing fee via the IARD.

(3) All persons seeking registration as an investment adviser representative must file the Form U-4 and the appropriate fee via IARD upon the ability of the system to accept such filings.

§116.3. Examination.

(a) Requirement. To determine the applicant's qualifications and competency to engage in the business of rendering investment advice, the State Securities Board requires written examinations. Applicants must make a passing score on any required examination.

(b) Examinations accepted. Each applicant for registration as an investment adviser or investment adviser representative must pass:

(1) the Uniform Investment Adviser Law Examination (the new entry level competency examination, Series 65, administered after December 31, 1999); or

(2) the following combination of examinations:

(A) a general securities representative examination as described in paragraph (1)(A) of this subsection or a limited examination as described in paragraph (1)(B) of this subsection; and

(B) the Uniform Combined State Law Examination (Series 66), the Uniform Investment Advisers State Law Examination (Series 65, as it existed and was administered on or before December 31, 1999), or an examination on the Texas Securities Act administered by this Agency.

(3) Each of these examinations (except the Texas Securities Act examination) is administered by the NASD and can be scheduled by submitting a Form U-10 to the NASD.

(c) Waivers of examination requirements.

(1) All persons who were registered in Texas on August 23, 1963, are not required to take any examinations.

(2) A full waiver of the examination requirements of the Texas Securities Act, §13.D, is granted by the Board to the following classes of persons:

(A) A person who was registered as an investment adviser or investment adviser representative on or before December 31,

1999, provided the person has maintained a registration as an investment adviser or investment adviser representative with any state securities administrator that has not lapsed for more than two years from the date of the last registration;

(B) applicants who are certified by the Association for Investment Management and Research, or its predecessors, the Federation of Chartered Financial Analysts or by the Institute of Chartered Financial Analysts, to be chartered financial analysts (CFA);

(C) applicants who are certified by the Certified Financial Planner Board of Standards, Inc., to use the mark "CERTIFIED FINANCIAL PLANNER" (CFP);

(D) applicants who are designated by the American Institute of Certified Public Accountants as accredited personal financial specialists (PFS);

(E) applicants who are designated by the Investment Counsel Association of America, Inc., as Chartered Investment Counsel (CIC);

(F) applicants who are designated by the American College, Bryn Mawr, Pennsylvania, as chartered financial consultants (ChFC); or

(G) a person who completed the examinations required under subsection (b) of this section, but whose registration has lapsed for more than two years and who has been continually employed in a securities-related position with an entity which was not required to be registered.

(3) The Association for Investment Management and Research, the Certified Financial Planner Board of Standards, Inc., the American Institute of Certified Public Accountants, the American College, and the Investment Counsel Association of America, Inc., are required to submit to the Securities Commissioner any changes to their certification programs as such changes occur.

(4) A partial waiver of the examination requirements of the Texas Securities Act, §13.D, is granted by the Board to solicitor applicants. Such persons are not required to take the general securities examination, but are required to pass an examination on state securities law.

(5) The Securities Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §13.D.

(d) Texas Securities Law Examination.

(1) The fee for each filing of a request to take the Texas securities law examination is $35. An admission letter issued by the Board is required for all entrants. The examination is given at 9:00 a.m. on each Tuesday at the office of the State Securities Board in Austin. The examination may be taken at other locations near principal population centers across the state. Testing centers require reservations and may charge an additional (monitor) fee for administering the examination. A list of examination centers with additional details may be obtained from the State Securities Board.

(2) While taking the examination on the Texas Securities Act, each applicant may use an unmarked copy of the Texas Securities Act as it is printed and distributed by the State Securities Board. No other reference materials are allowed to be used by applicants during the examination.

(3) The passing score for all applicants on the examination on the Texas Securities Act is 70%. An applicant who fails the examination on the Texas Securities Act may request reexamination. The applicant must bring his or her application up to date before retaking an examination.

§116.4. Evidences of Registration.

(a) Issuance. An evidence of registration or certificate of registration shall be issued for each registered investment adviser reflecting the registered officer or partner. An evidence of registration shall be issued for each registered branch office reflecting the registered branch office manager.

(b) Amendments and successor entities.

(1) Changes in the information reflected on the evidence of registration must be submitted to the Securities Commissioner within 30 days of such change, in order that amendments may be made. Upon receipt of the amended evidence of registration, the investment adviser must surrender the original to the Commissioner. The fee for filing to amend the evidence of registration is $25.

(2) Structural changes to a currently registered investment adviser, including reorganizations, mergers, or consolidations, that result in a surviving entity that is not currently registered, will require the filing of a new application and fees for registration. Upon registration of the surviving entity, the registration of the predecessor investment adviser will be terminated.

(3) The application for the successor entity should be filed far enough in advance that the application can be reviewed and approved prior to the successor entity taking over the business of the registered investment adviser. If a successor entity has taken over the business of a registered investment adviser before the application of the successor entity has been reviewed and approved, the registration of the successor entity will be automatically granted a temporary registration for 60 days from the date of succession to complete the registration for the new entity. If the successor entity fails to complete the registration requirements within the 60-day temporary registration period, it may submit a written request to the Securities Commissioner to grant an extension of the temporary registration for up to 30 additional days. If the Commissioner, in the exercise of his or her discretion, declines to grant the extension request, the registration will terminate for the investment adviser and all its investment adviser representatives on the expiration of the 60-day temporary registration. Any investment advisory services rendered by the investment adviser and/or its investment adviser representatives after termination of the temporary registration are subject to the sanctions provided by the Texas Securities Act for rendering investment advice while unregistered. An additional fee of $25, as required in paragraph (1) of this subsection, must be submitted since it will involve an amendment to the evidence of registration if the application is approved.

(4) All procedures set forth in this subsection shall also apply to investment advisers and investment adviser representatives who have submitted a notice filing and fee to the Securities Commissioner.

(c) Termination. An investment adviser is required to notify the Securities Commissioner upon termination of any registered investment adviser representative from its employ. Upon receipt of such notification, the Securities Commissioner may terminate the registration.

(d) Renewal.

(1) Procedures for renewing expired and unexpired registrations are set forth in the Texas Securities Act, §19.C.

(2) A notice of impending expiration of registration (renewal application) will be sent to a currently registered investment adviser at least 30 days before the expiration of its registration. The renewal application should be returned to the State Securities Board for processing, along with the appropriate fee.

(3) If a person's registration is not renewed in a timely manner because such person is or was on active duty with the armed forces of the United States of America serving outside Texas, such person may renew the registration pursuant to this paragraph.

(A) Renewal of the registration may be requested by such person, such person's spouse, or an individual having power of attorney from such person. The renewal application shall include a current address and telephone number for the individual requesting the renewal.

(B) Renewal may be requested before or after expiration of the registration.

(C) A copy of the official orders or other official military documentation showing that such person is or was on active duty serving outside Texas shall be submitted to the Securities Commissioner along with the renewal application.

(D) A copy of the power of attorney from such person, if any, shall be filed with the Securities Commissioner along with the renewal application if the individual having the power of attorney executes any of the documents required in this paragraph.

(E) A renewal application submitted to the Securities Commissioner pursuant to this paragraph shall be accompanied by the applicable renewal fee set out in §116.8 (relating to Fee Requirements).

(F) The State Securities Board will not assess any increased fee or other penalty against the person for failure to timely renew such person's registration if such person establishes to the satisfaction of the Securities Commissioner that all requirements of this paragraph have been met.

§116.5. Minimum Records.

(a) Investment adviser records. Compliance with the record-keeping requirements of the United States Securities and Exchange Commission, found in 17 Code of Federal Regulations §275.204-2, will satisfy the requirements of this section.

(b) Records to be made by investment advisers. Persons registered as investment advisers whose principal place of business is located in another state shall maintain records at least in accordance with the minimum record keeping requirements of that state. Persons registered as investment advisers whose principal place of business is located in Texas shall make and keep current the following minimum records or the equivalent thereof:

(1) A journal or journals, including cash receipts and disbursements records, and any other records or original entry forming the basis of entries in any ledger.

(2) General and auxiliary ledgers, (or other comparable records) reflecting asset, liability, reserve capital, income and expense accounts.

(3) A memorandum of each order given by the investment adviser for the purchase or sale of any security, of any instruction received by the investment adviser from the client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. Such memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment adviser who recommended the transaction to the client and the person who placed such order; and shall show the account for which entered, the date of entry, and the bank, broker, or dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.

(4) A list or other record of all accounts in which the investment adviser is vested with any discretionary power with respect to funds, securities, or transactions of any client.

(5) A copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication recommending the purchase or sale of a specific security, which the investment adviser circulates or distributes, directly or indirectly to 10 or more persons (other than investment supervisory clients or persons connected with such investment adviser), and if such notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication does not state the reasons for such recommendation, a memorandum of the investment adviser indicating the reasons therefor.

(6) In the case of any client receiving investment supervisory or management service, to the extent that the information is reasonably available to or obtainable by the investment adviser, records showing separately for that client:

(A) the client's current position in any security; and

(B) all securities purchased and sold and the date, amount, and price of each purchase and sale.

(7) In the case of an investment adviser who has custody or possession of the funds or securities of any client:

(A) a journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for such accounts and other debits and credits to such accounts;

(B) a separate ledger account for each such client showing all purchases, sales, receipts, and deliveries of securities, the date and price of each such purchase and sale, and all debits and credits;

(C) copies of confirmations of all transactions effected by or for the account of any such client; and

(D) a record for each security in which any client has a position, which record shall show the name of each such client having any interest in each security, the amount or interest of each such client, and the location of each such security.

(8) A record of every transaction in a security in which the investment adviser or any investment adviser representative has, or by reason of such transaction acquires any direct or indirect beneficial ownership, except:

(A) transactions effected in any account over which neither the investment adviser nor any investment adviser representative has any direct or indirect influence or control; and

(B) transactions in securities which are direct obligations of the United States. Such record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale, or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer, or bank with or through whom the transaction was effected. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

(c) Records to be preserved by investment advisers.

(1) Persons registered as investment advisers in Texas shall preserve all records required pursuant to subsection (b) of this section for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an easily accessible place.

(2) Person registered as investment advisers in Texas shall preserve for a period of not less than three years from the end of the

fiscal year during which the last entry was made on such record, the first two years in an easily accessible place:

(A) all checkbooks, bank statements, cancelled checks, and cash reconciliations of the investment adviser;

(B) all bills or statements (or copies thereof) paid or unpaid, relating to the business of the investment adviser as such;

(C) all trial balances, financial statements, and internal audit working papers relating to the business of such investment adviser;

(D) originals of all written communications received and copies of all written communications sent by such investment adviser relating to:

(i) any recommendation made or proposed to be made and any advice given or proposed to be given;

(ii) any receipt, disbursement, or delivery of funds or securities; or

(iii) the placing or execution of any order to purchase or sell any security. Provided, however, that the investment adviser shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment adviser, and that if the investment adviser sends any notice, circular, or other advertisement offering any report, analysis, publication, or other investment advisory service to more than 10 persons, the investment adviser shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if such notice, circular, or advertisement is distributed to persons named on any list, the investment adviser shall retain with the copy of such notice, circular, or advertisement a memorandum describing the list and the source thereof;

(E) all powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment adviser or copies thereof;

(F) all written agreements (or copies thereof) entered into by the investment adviser with any client or otherwise relating to the business of such investment adviser as such; and

(G) all complaints received from investment clients, and all documents relating to such complaints.

(3) Persons registered as investment advisers in Texas shall preserve for at least three years after the termination of the enterprise partnership articles and any amendments thereto, articles of incorporation, charters, minute books, and stock certificate books of the investment adviser and of any predecessor.

(4) If a person ceases to be registered as an investment adviser in Texas, such person shall, for the remainder of the time period specified in this section, continue to preserve the records required in this section.

(5) The records required to be maintained and preserved pursuant to this section may be immediately produced or reproduced on microfilm or other photograph and may be maintained and preserved for the required time in that form, provided that such microfilms or other photographs are arranged and indexed in such a manner as to permit the immediate location of any particular document, and that such microfilms or other photographs are at all times available for examination by representatives of the Securities Commissioner together with facilities for immediate, easily readable projection of the microfilm or other photograph and for the production of easily readable facsimile enlargements.

(d) The records required to be maintained pursuant to this section may be maintained by any electronic storage media available so long as such records are available for immediate free access by representatives of the Securities Commissioner. Any electronic storage media must preserve the records exclusively in a non-rewriteable, non-eraseable format; verify automatically the quality and accuracy of the storage media recording process; serialize the original and, if applicable, duplicate units of storage media, and time-date for the required period of retention the information placed on such electronic storage media; and have the capacity to download indexes and records preserved on electronic storage media to an acceptable medium. In the event that a records retention system commingles records required to be kept under this section with records not required to be kept, representatives of the Securities Commissioner may review all commingled records.

(e) The Securities Commissioner has a right to review all records maintained by registered investment advisers regardless of whether such records are required to be maintained under any specific applicable rule provision.

§116.6. Registration of Persons with Criminal Backgrounds.

(a) The application for registration may be denied, suspended, or revoked if the Securities Commissioner finds that the person has been convicted of any felony, or of a misdemeanor offense that directly relates to its duties and responsibilities. In determining whether a misdemeanor conviction directly relates to such duties and responsibilities, the Securities Commissioner shall consider:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes for requiring registration of investment advisers and investment adviser representatives;

(3) the extent to which the registration applied for might offer an opportunity to engage in further criminal activity of the same type as that in which the applicant previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a registered investment adviser or investment adviser representative.

(b) The Securities Commissioner shall consider the following evidence in determining the present fitness of an applicant who has been convicted of a crime:

(1) The extent and nature of the person's past criminal activity.

(2) The age of the applicant at the time of the commission of the crime.

(3) The amount of time that has elapsed since the applicant's last criminal activity.

(4) The conduct and work activity of the applicant prior to and following the criminal activity.

(5) Evidence of the applicant's rehabilitation or rehabilitative effort while incarcerated or following release.

(6) Other evidence of the applicant's present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the applicant; the sheriff and chief of police in the community where the applicant resides; and any other persons in contact with the applicant.

(7) It shall be the responsibility of the applicant to the extent possible to secure and provide to the Securities Commissioner the recommendation of the prosecution, law enforcement, and correctional

authorities as required under this section. The applicant shall also furnish proof to the Securities Commissioner that he or she has maintained a record of steady employment and has supported his or her dependents and has otherwise maintained a record of good conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which he or she has been convicted.

(c) The State Securities Board considers that the following crimes directly relate to the duties and responsibilities of investment advisers and investment adviser representatives:

(1) any criminal violation of which fraud is an essential element or that involves wrongful taking or possession of property or services;

(2) any criminal violation of the securities laws or regulations of this state, or of any other state in the United States, or of the United States, or any foreign jurisdiction;

(3) any criminal violation of statutes designed to protect consumers against unlawful practices involving insurance, securities, commodities or commodity futures, real estate, franchises, business opportunities, consumer goods, or other goods and services; and

(4) any criminal violation involving an assault on a person.

§116.7. Maintenance and Inspection of Records.

(a) All records required to be maintained by registered investment advisers shall be maintained at the location designated in Form 133.16 and at such other locations registered as branch offices with the Securities Commissioner.

(b) The Securities Commissioner or his or her authorized representative may conduct on-site examinations of registered investment advisers without notice and shall be entitled to immediate and free access to all records, required to be maintained pursuant to Board rules or maintained in the course of the normal business of the investment adviser, and to all locations where such records are kept. The Commissioner or his or her authorized representative shall be permitted to make photostatic or computer copies of such records.

(c) In the alternative, the Securities Commissioner or his or her authorized representative may require that all records maintained pursuant to Board rules or maintained in the course of the normal business of the investment adviser be made available in any office of the State Securities Board designated by the Commissioner or his or her representative within 48 hours of a request or within a greater time period as the Commissioner or his or her authorized representative deems reasonable.

§116.8. Fee Requirements.

(a) Registration and notice filing fees. Registration and notice filing fees are as follows:

(1) Investment Adviser - $275 for original applications and $240 for renewal applications.

(2) Investment Adviser Representative, Officer, Partner, or Solicitor of an Investment Adviser - $235 for original applications and $220 for renewal applications.

(b) Reduced fees for certain person registered in multiple capacities.

(1) In general. A person may request reduced fees under paragraph (2) of this subsection, provided they are registered or are seeking registration in Texas:

(A) as either an agent of a securities dealer or as a sole proprietor securities dealer; and

(B) as either an investment adviser representative of an investment adviser that has less than five investment adviser representatives or as a sole proprietor investment adviser with less than five investment adviser representatives.

(2) Procedure. Persons meeting the requirements of paragraph (1) of this subsection may request reduced registration fees by filing Form 133.36, Request for Reduced Fees for Certain Persons Registered in Multiple Capacities. Form 133.36 must be filed at the time the original application for investment adviser representative or sole proprietor investment adviser registration is filed, or at least 30 days before the person's existing investment adviser representative or sole proprietor investment adviser registration will expire. On review of Form 133.36, the Securities Commissioner may, in his or her discretion, grant or deny the request for reduced fees or direct the person to supply additional information.

(3) Reduced fees. If the Securities Commissioner grants a person's request, the person must pay all applicable fees for registration as a dealer or dealer's agent as specified in the Texas Securities Act, §§35.A, 35.B, and 41(a), but is exempt from the fees specified in the Texas Securities Act, §41(a), in connection with original and renewal applications for registration as an investment adviser representative or sole proprietor investment adviser, as applicable at the time Form 133.36 is filed. The reduction in fees granted by the Securities Commissioner under this subsection shall continue in force, without any further filings, as long as a person remains registered in a multiple capacity status.

§116.9. Post-Registration Reporting Requirements.

(a) Each person registered as an investment adviser shall report to the Securities Commissioner within 30 days after its entry against the registered person or an investment adviser representative thereof, the matters described in this subsection. Likewise, each person registered as an investment adviser representative shall report to the Commissioner within 30 days after its occurrence or entry against the investment adviser representative the matters described in this subsection. The following matters must be reported:

(1) any administrative order issued by state or federal authorities, which order:

(A) is based upon a finding that such person has engaged in fraudulent conduct; or

(B) was entered after notice and opportunity for a hearing, denying, suspending, or revoking the person's registration as an investment adviser, investment adviser representative, dealer, or agent, or the substantial equivalent of those terms;

(2) any felony criminal action or conviction;

(3) any misdemeanor action or conviction based on fraud, deceit, or wrongful taking of property;

(4) any order, judgment, or decree entered by any court of competent jurisdiction which temporarily or permanently restrains or enjoins such person from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving any false filing with any state; or which restrains or enjoins such person from activities subject to federal or state statutes designed to protect consumers against unlawful or deceptive practices involving insurance, commodities or commodity futures, real estate, franchises, business opportunities, consumer goods, or other goods and services;

(5) any expulsion, bar, suspension, censure, fine, or penalty imposed by a self-regulatory organization;

(6) any change in any other information previously disclosed to the Securities Commissioner on any application form or filing; and

(7) the filing of any voluntary or involuntary bankruptcy petition.

(b) Upon request by the Securities Commissioner, an investment adviser or investment adviser representative is required to furnish to the Commissioner copies of the order, conviction, or decrees, or other documents which evidence events disclosable pursuant to subsection (a) of this section.

(c) For purposes of this section an "investment adviser" shall include any partners, directors, executive officers, or beneficial owners of 10% or more of any class of the equity securities of an investment adviser (beneficial ownership meaning the power to vote or direct the vote of and/or the power to dispose or direct the disposition of such securities).

§116.10. Supervisory Requirements.

Each investment adviser shall establish and maintain a system to supervise the activities of its investment adviser representatives that is reasonably designed to achieve compliance with the Texas Securities Act and Board rules.

§116.11. Disclosure Requirement/Brochure Rule.

All registered investment advisers must deliver to all clients or prospective clients a written disclosure statement that may be:

(1) either Part II of Form ADV, Uniform Application for Investment Adviser Registration, or another disclosure statement which contains at least the information disclosed on Part II of Form ADV (17 Code of Federal Regulations §279.1) as made effective in Release Number IA-991 and corrected in Release Number IA-991A; or

(2) a disclosure statement containing at least the information required by Schedule H of Form ADV, Uniform Application for Investment Adviser Registration, if the investment adviser is the sponsor, or the sponsor and the portfolio manager, of a wrap fee program that the client will enter into.

(3) The disclosure statement shall be delivered to a client or prospective client either:

(A) not less than 48 hours prior to entering into any written or oral investment advisory contract with such client or prospective client; or

(B) at the time of entering into any such contract, if the advisory client has the right to terminate the contract without penalty within five business days after entering into the contract.

(4) On an annual basis, the Part II of Form ADV or other disclosure statement satisfying the requirements of paragraph (1) or (2) of this section must be provided to all customers, or in the alternative, the investment adviser must offer the client the right to receive such Part II of Form ADV or other disclosure statement.

§116.12. Advisory Contract Requirements.

(a) The advisory contract must contain the following language: "Client acknowledges receipt of Part II of Form ADV; a disclosure statement containing the equivalent information; or a disclosure statement containing at least the information required by Schedule H of Form ADV, if the client is entering into a wrap fee program sponsored by the investment adviser. If the appropriate disclosure statement was not delivered to the client at least 48 hours prior to the client entering into any written or oral advisory contract with this investment adviser, then the client has the right to terminate the contract without penalty within five business days after entering into the contract. For the purposes of this provision, a contract is considered entered into when all parties to the contract have signed the contract, or, in the case of an oral contract, otherwise signified their acceptance, any other provisions of this contract notwithstanding."

(b) Investment advisers are free to provide a time period longer than five business days for penalty-free termination by their clients. If the client chooses to terminate the contract within the five business day period, the adviser can only charge for fees incurred prior to the termination excluding administrative fees, account set-up fees, and minimum quarterly fees.

(c) The advisory contract must contain a provision that prohibits the assignment of the contract by the adviser without the written consent of the client.

(d) Nothing in this section shall relieve an investment adviser from any obligation pursuant to any provision of the Investment Advisers Act of 1940 or the rules and regulations thereunder or other federal case law, interpretative opinions, and administrative actions by the SEC (as in existence on April 8, 1997) or state law to disclose any information to its clients not specifically required by this section.

§116.13. Advisory Fee Requirements.

(a) Any investment adviser who wishes to charge 3.0% or greater of the assets under management must disclose that such fee is in excess of the industry norm and that similar advisory services can be obtained for less.

(b) Any investment adviser who wishes to charge a fee based on a share of the capital gains or the capital appreciation of the finds or any portion of the funds of a client must comply with SEC Rule 205-3 (17 Code of Federal Regulations §275.205-3), which prohibits the use of such fee unless the client is a "qualified client." In general, a qualified client may include:

(1) a natural person or company who at the time of entering into such agreement has at least $750,000 under the management of the investment adviser;

(2) a natural person or company who the adviser reasonably believes at the time of entering into the contract:

(A) has a net worth of jointly with his or her spouse of more than $1,500,000; or

(B) is a qualified purchaser as defined in §2(a)(51)(A) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(51)(A)); or

(3) a natural person who at the time of entering into the contract is:

(A) An executive officer, director, trustee, general partner, or person serving in similar capacity of the investment adviser; or

(B) An employee of the investment adviser (other than an employee performing solely clerical, secretarial, or administrative functions with regard to the investment adviser), who, in connection with his or her regular functions or duties, participates in the investment activities of such investment adviser, provided that such employee has been preforming such functions and duties for or on behalf of the investment adviser, or substantially similar function or duties for or on behalf of another company for at least 12 months.

§116.14. Prevention of Misuse of Nonpublic Information.

All investment advisers registered under the Texas Securities Act are required to establish, maintain, and enforce written policies and procedures reasonable designed to prevent the misuse of material nonpublic information.

§116.15. Advertising Restrictions.

The antifraud provisions of the Texas Securities Act prohibit an investment adviser from using any advertisement that contains any untrue statement of material fact or that is otherwise misleading. The prohibition would include any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio, television, Internet, the World Wide Web, or similar proprietary or common carrier electronic systems, that offers any service as an investment adviser.

(1) Specifically, an advertisement may not:

(A) use or refer to testimonials (including any statement of a client's experience or endorsement);

(B) refer to past, specific recommendations made by an investment adviser that were profitable, unless the advertisement sets out a list of all recommendations made by the investment adviser within the preceding period of not less than one year, and complies with paragraph (2) of this subsection;

(C) represent that any graph, chart, formula, or other device can, in and of itself, be used to determine which securities to buy or sell, or when to buy or sell securities, or assist persons in making those decisions, unless the advertising prominently discloses the limitations thereof and the difficulties regarding its use; and

(D) represent that any report, analysis, or other service will be provided without charge unless the report, analysis, or other service will be provided without any obligation whatsoever.

(2) An investment adviser may advertise its past performance (both actual performance and hypothetical or model results) only if the advertisement discloses all material facts necessary to avoid any unwarranted inference. An investment adviser may not advertise its performance data if the advertisement:

(A) fails to disclose the effect of material market or economic conditions on the results advertised;

(B) fails to disclose whether and to what extent the advertised results reflect the reinvestment of dividends or other earnings;

(C) suggests or makes claims about the potential for profit without disclosing the potential for loss; or

(D) omits any of the facts material to the performance figures.

(3) In addition, generally an investment adviser may not advertise gross performance data (i.e., performance data that does not reflect the deduction of various fees, commissions, and expenses that a client would pay) unless the investment adviser also includes net performance information in an equally prominent manner.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101685
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-8300

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CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

7 TAC §139.20

The State Securities Board proposes an amendment to §139.20, concerning third party brokerage arrangements on financial entity premises. The amendments respond to certain comments received when this exemption was considered for adoption at a prior meeting of the Board. The amendments address compensation between the financial entity and the registered dealer, define "premises," and clarify the record keeping requirements.

Michael S. Gunst, Director, Dealer Registration Division, and David Grauer, Director, Enforcement Division, have determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Gunst and Mr. Grauer also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to clarify the conditions on availability of the exemption. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendment is proposed under Texas Civil Statutes, Articles 581-28-1 and 581-12.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12.B provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

The proposed amendment affects Texas Civil Statutes, Articles 581-12, 581-13, and 581-18.

§139.20. Third Party Brokerage Arrangements on Financial Entity Premises.

(a) The State Securities Board, pursuant to the Texas Securities Act, §12.B, exempts a financial entity from the dealer registration requirements of the Texas Securities Act, when such financial entity is engaging in securities-related activity consisting solely of acting as a correspondent in a third party brokerage arrangement coordinated with a registered dealer on the premises of the financial entity. A financial entity may receive compensation for such an arrangement based on a percentage of commissions generated by the arrangement or on the basis of leased space of the premises; officers and employees of the financial entity may receive compensation as set forth in subsection (b) of this section. For purposes of this section, the following words and terms shall have the following meanings:

(1) "financial entity" shall include any state or national bank, any federal savings and loan association or savings and loan association organized and subject to the laws and regulation of this State as defined in §109.17 of this title (relating to Banks Under The Securities Act, §5.L), or any credit union, insurance company, bank holding company, or financial holding company organized and subject

to functional regulation under the laws of the United States or under the laws of any State or territory of the United States;

(2) "acting as a correspondent in a third party brokerage arrangement" means that the activity of the financial entity is limited to providing an area on the financial entity premises for the dealer's brokerage activities, advertising the brokerage service, referring customers to a representative of the dealer, and performing clerical or ministerial functions in connection with brokerage transactions including scheduling appointments with agents of the dealer and transferring customer funds or securities;[.]

(3) "premises" shall include the physical location of the financial entity, including all of its branches, as well as the financial entity's web site. Thus, a financial entity may engage in linking arrangements with third party brokerages within this exemption.

(b)-(c) (No change.)

(d) Any financial entity relying on this exemption shall, upon written request, furnish to the Securities Commissioner any information relative to the third party brokerage arrangement that the Commissioner deems relevant, including, but not limited to, records regarding referral fee payments to employees and officers of the financial entity, agreements between the financial entity and the registered dealer, and customer complaints regarding the brokerage activities. Standard compensation records are sufficient "records regarding referral fee payments to employees and officers." All records required by this subsection shall be kept for the life of the third party brokerage arrangement plus an additional five years and may be retained electronically, in hard copy form, microfilm, or microfiche.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101686
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-8300

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7 TAC §139.21

The State Securities Board proposes a new §139.21, concerning Canadian self-directed retirement plans. The new section would create an exemption for transactions involving Canadian self-directed retirement plans. Canadian dealers and agents, when dealing with retirement plans of Canadian persons who are present in Texas, would not be required to be registered. A notice filing and payment of initial and annual fees by the dealer and agent would be required and the exemption would be conditioned upon the dealer making records relating to the exempt transaction available upon request by the Securities Commissioner. The securities offered and sold in these limited transactions would be exempt from the securities registration requirements of the Texas Securities Act.

Michael S. Gunst, Director, Dealer Registration Division, Micheal Northcutt, Director of Securities Registration, and David Grauer, Director, Enforcement Division, have determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Gunst, Mr. Northcutt, and Mr. Grauer also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to enable persons present in Texas to be able to continue to manage the assets in their Canadian retirement accounts. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal to be considered by the Board should be submitted in writing within 45 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The new rule is proposed under Texas Civil Statutes, Articles 581-28-1, 581-5.T, and 581-12.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.B provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

The new rule affects Texas Civil Statutes, Articles 581-7, 581-10, 581-12, 581-13, 581-18, and 581-19.

§139.21. Canadian Self-Directed Retirement Plans.

(a) The State Securities Board, pursuant to the Texas Securities Act, §§5.T and 12.B, exempts Canadian dealers and agents from the registration requirements of the Texas Securities Act, when such dealers and agents comply with subsections (b) thru (d) of this section and are conducting a transaction in a self-directed tax advantaged retirement plan of which the holder or contributor is a person from Canada who is resident in this state.

(b) The filing and fee requirements for dealers and agents exempted from registration pursuant to this section are preserved.

(1) Dealers.

(A) Initially, the exemption provided by subsection (a) is available after the filing of:

(i) a notice in the form of the dealer's current application for registration required by the jurisdiction in which the dealer's principal office is located;

(ii) a consent to service of process;

(iii) evidence of membership in a self-regulatory organization, a stock exchange in Canada, or the bureau "des services financiers" of Quebec;

(iv) evidence of registration and good standing with the provincial or territorial jurisdiction in which the dealer's principal office is located; and

(v) a fee equal to the amount that would have been paid had the dealer filed for registration in Texas.

(B) Annually, the dealer files renewal fees which would have been paid had the dealer been registered in Texas.

(2) Agents.

(A) Initially, the exemption provided by subsection (a) is available after the filing of:

(i) a notice in the form required by the jurisdiction in which the dealer's principal office is located;

(ii) evidence of registration and good standing in the jurisdiction from which the agent is effecting transactions into this state; and

(iii) a fee equal to the amount that would have been paid had the agent filed for registration in Texas.

(B) Annually, the agent files renewal fees which would have been paid had the agent been registered in Texas.

(c) A Canadian dealer must be a member of a self-regulatory organization, a stock exchange in Canada, or the bureau "des services financiers" of Quebec, and maintain provincial or territorial registration and membership in a Canadian self- regulatory organization or stock exchange in good standing. An agent must be registered and in good standing in the jurisdiction from which he or she is effecting transactions into this state and maintain registration in such jurisdiction in good standing.

(d) Any Canadian dealer or agent relying on this exemption shall, upon written request, furnish to the Securities Commissioner any information relative to a self-directed plan transaction covered by this section that the Commissioner deems relevant.

(e) The State Securities Board, pursuant to the Texas Securities Act, §5.T, exempts from the securities registration requirements of the Texas Securities Act, §7, the offer and sale of any securities effected by a Canadian dealer pursuant to this section.

(f) The Texas Securities Act prohibits fraud or fraudulent practice in connection with the sale or offer for sale of securities covered by this exemption.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101687
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-8300

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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 R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §26.465, §26.469

The Public Utility Commission of Texas (commission) proposes an amendment to §26.465 relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers and proposes new §26.469 relating to Public Right-of-Way Fees and Penalties. The proposed amendment and new section will implement House Bill 1777, 76th Legislature, Regular Session (1999) (HB 1777) which authorizes the commission to determine a uniform method for calculating municipal franchise compensation paid by certificated telecommunications providers (CTPs). The proposed amendment and new rule clarify which access lines are subject to HB 1777, specifying its application to lines that pass through municipalities and set standards for fees and penalties assessed by municipalities with regard to use of public right-of-way (ROW) by CTPs. Nothing in this rule proposal is intended to expand the statutory definition of "CTP" or definition of "transmission path." Local Government Code, §283.003(2) defines a CTP to mean a "person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service." A transmission path is defined in the commission's substantive rules at §26.465(c)(2) as "A path within the transmission media that allows the delivery of switched local exchange service. Each individual circuit-switched service shall constitute a single transmission path. Where services are offered as part of a bundled group of services, each switched service in that bundled group of services shall constitute a single transmission path. Only those services that require the use of a circuit-switch shall constitute a switched service. Services that constitute vertical features of a switched service, such as call waiting, caller-ID, etc., that do not require a separate switched path, do not constitute a transmission path. Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path." Project Number 22909 has been assigned to this proceeding.

Alyssa Eacono, Network Analyst, Telecommunications Division and Michelle Lingo, Senior Attorney, Policy Development Division, have determined that for each year of the first five-year period the proposed amendment and proposed new section are in effect, there will be no fiscal implications for the state as a result of enforcing or administering the sections. Because there are at least 1100 diverse municipalities in Texas, fiscal implications may vary. However, because these proposed rules do not alter a municipality's option to exercise its police power-based regulations in accordance with Local Government Code, §283.056(c), there should be no fiscal impact on any given municipality. In addition, because Local Government Code, §283.051(b) provides that municipalities continue to have the right to initiate legal action against CTPs, there is no fiscal implication regarding remedies available to municipalities.

Ms. Eacono and Ms. Lingo have determined that for each year of the first five years the proposed amendment and proposed new section are in effect, the public benefit anticipated as a result of enforcing the sections will be greater accessibility to telecommunications services and more efficient use of public ROW. Because HB 1777 decreases barriers to entry into the telecommunications market, small businesses and micro-businesses will incur no negative effect as a result of enforcing these sections. Persons who are required to comply with the proposed sections will experience some economic costs, but the economic benefits may outweigh the costs. Municipalities had various arrangements with CTPs prior to HB 1777. Because HB 1777 provides

uniformity for CTPs to gain access to all public ROW, implementation of HB 1777 may have impacts that differ among municipalities. Some municipalities and CTPs may even experience an economic benefit due to the clarity, consistency, and uniformity imposed in the amended and new rules. As a result of these decreased barriers to entry into the telecommunications market, telecommunications competition is likely to increase, thereby providing greater choice for telecommunications consumers in Texas. The public also benefits through more efficient use of public ROW.

Ms. Eacono and Ms. Lingo have also determined that for each year of the first five years the proposed amendment and proposed new section are in effect, there should generally be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act, §2001.022. The commission acknowledges that infrastructure is constantly being built on an on-going basis. However, HB 1777 was designed to be revenue neutral; the effects of construction will neither increase nor decrease impacts to the local economy. In fact, the fiscal impact of pass through lines rests on the expectation of a municipality for a revenue amount rather than on a true impact to that amount. The proposed amendment and new rule does not alter a provider's choice as to where infrastructure should be placed. With regard to fees and penalties, the net effect of the rule is an enhancement and clarification of a city's ROW management authority as it relates to compensation issues. The proposal does not modify, but rather clarifies, the amount of fees or penalties that are being correctly assessed. Therefore, this rulemaking poses no impact to the local economy.

The commission staff will conduct a public hearing on this rulemaking under Government Code, §2001.029 in the Commissioners' Hearing Room (7-100) at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Thursday, June 21, 2001 at 10:00 a.m.

During the November 8, 2000 Workshop and in the briefs which followed, there was discussion regarding the creation of a standardized ordinance. The commission invites comments on whether the commission should promulgate rules or create guidelines for a uniform public ROW ordinance to be adopted by municipalities in Texas.

Written comments on the proposed amendment and new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, until 3:00 p.m. on Monday, June 4, 2001. Reply comments may be submitted until 3:00 p.m. on Monday, June 18, 2001. The commission invites comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendment and new section. All comments and reply comments should refer to Project Number 22909 and must be filed in the Central Records Division.

The amendment and new rule are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 (Vernon 1998, Supplement 2001), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The new rule and rule amendment are also proposed under Local Government Code, §283.058, which grants the commission jurisdiction over municipalities and CTPs necessary to enforce the provisions of Chapter 283.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Local Government Code §283.058.

§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

(a) - (c) (No change.)

(d) Methodology for counting access lines. A CTP's access line count shall be the sum of all lines counted pursuant to paragraphs (1), (2), and (3) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1) Switched transmission paths and services.

(A) - (B) (No change.)

(C) If the transmission path crosses more than one municipality, the line shall be counted in, and attributed to, the municipality where the end-use customer is located. Pursuant to Local Government Code, §283.056(f), the per-access-line franchise fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of- way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation.

(2) - (3) (No change.)

(e) (No change.)

(f) Lines not to be counted. A CTP shall not count the following lines:

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

(4) lines used by any other affiliate of a CTP for interoffice transport; [~~and~~]

(5) lines that pass through a municipality but do not terminate at an end-use customer's premises within that municipality, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises in accordance with Local Government Code, §283.056(f); and

(6) [~~(5)~~] any other lines that do not meet the definition of access line as set forth in §26.461 of this title.

(g) - (m) (No change.)

§26.469. Public Right-Of-Way Fees and Penalties.

(a) Purpose. The provisions of this section clarify the definitions and applicability of fees and penalties as these relate to municipal compensation and right-of-way (ROW) management.

(b) Applicability. The provisions of this section apply to certificated telecommunications providers (CTPs), as defined by §26.461(c) of this title (relating to Access Line Categories) and to incorporated municipalities within the State of Texas.

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

(1) Fees--Compensation to a municipality for the use of public ROW. Fees are uniformly applied to all similarly-situated ROW users.

(2) Penalties--Fines charged for noncompliance with a clear, nondiscriminatory, and competitively neutral standard.

(d) Assessment of fees by municipalities.

(1) A municipality may not require a CTP to pay any compensation other than the per- access-line franchise fee authorized

by Local Government Code, §283.055, for the right to use a public right-of-way to provide telecommunications services in the municipality. In accordance with Local Government Code, §283.056, such prohibited fees include, but are not limited to, application, franchise, license, permit, approval, excavation, inspection, or other similar fees or charges.

(2) Notwithstanding paragraph (1) of this subsection, a municipality may require a CTP to pay pole rental fees, special assessments, and taxes of any kind, including ad valorem or sales and use taxes, or other compensation not related to the use of a public right-of-way.

(e) Assessment of penalties by a municipality.

(1) To the extent elsewhere authorized by law, a municipality may assess penalties against a CTP for violations of a municipality's public right-of-way management ordinance or other written municipal policy.

(2) Any penalties for violation of a municipality's public right-of-way management ordinance or other written municipal policy shall be assessed on a non- discriminatory and competitively neutral basis, in accordance with a written policy made publicly available.

(3) As set forth in Local Government Code, §283.056, any penalties assessed by a municipality for non-compliance by a CTP are not included within the per-access- line franchise fee paid by CTPs under Local Government Code, §283.055.

(4) Any penalties assessed by a municipality for non-compliance by a CTP are not franchise fees or municipal fees within the meaning of the Utilities Code; therefore, penalties may not be passed through to customers as a municipal 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 March 23, 2001.

TRD-200101673
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 936-7308

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCREDITATION

SUBCHAPTER AA. ACCOUNTABILITY RATINGS AND ACKNOWLEDGMENTS

19 TAC §97.1002

The Texas Education Agency (TEA) proposes an amendment to §97.1002, concerning school district accountability ratings and acknowledgments. The section adopts by reference the most current version of part 1 the annual accountability manual, which specifies the indicators, standards, and procedures used by the commissioner of education to determine standard accountability ratings and to determine acknowledgment on additional indicators for Texas public school districts and campuses, as authorized by Texas Education Code (TEC), §§39.051(c)-(e), 39.073, 39.074(a)-(b), and 39.075. Part 1 of the annual accountability manual also specifies procedures for submitting an appeal and system safeguard analyses used to assess the integrity of the accountability system. The intention is to annually update the section to refer to the most recently published accountability manual.

The proposed amendment updates the section to adopt by reference *Part 1* of the *2001 Accountability Manual*, dated April 2001, for school year 2000-2001. The accountability system evolves from year to year so the criteria and standards for rating and acknowledging schools in 2001 differ to some degree over those applied in 2000. The biggest differences related to ratings is making the dropout rate standard for the *Recognized* and *Acceptable / Academically Acceptable* ratings more rigorous and changing minimum size criteria to include more students in the ratings evaluations. For acknowledgments, the attendance rate is now an Additional Indicator and the standard to be acknowledged for participation in the State Board of Education's Recommended High School Program has been raised to 35 percent of reported graduates. This year, ratings and acknowledgments are scheduled to be released on August 16, 2001.

Given the statewide application of the accountability rating process and the existence of sufficient statutory authority for the commissioner of education to adopt by reference *Part 1* of the *2001 Accountability Manual*, legal counsel with the TEA has recommended that the procedures for issuing regular accountability ratings for public school districts and campuses be adopted as part of the *Texas Administrative Code* .

Criss Cloudt, Associate Commissioner for Accountability Reporting and Research, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Dr. Cloudt has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be continued knowledge by the public of the existence of annual manuals specifying rating procedures for the public schools. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Criss Cloudt, 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 section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §§39.051(c)-(e), 39.073, 39.074(a)-(b), and 39.075, which authorize the commissioner of education to specify the indicators, standards, and procedures used to determine standard accountability ratings and to determine acknowledgment on additional indicators.

The amendment implements the Texas Education Code, §§39.051(c)-(e), 39.073, 39.074(a)-(b), and 39.075.

§97.1002. Adoption by Reference: Standard Procedures.

(a) The standard procedures by which districts and campuses are rated and acknowledged for school year 2000-2001 [~~1999-2000~~] are described in the official Texas Education Agency (TEA) publication, *Part 1* of the *2001* [~~2000~~] *Accountability Manual*, dated April 2001 [~~2000~~], which is adopted by this reference as the agency's official rule. A copy of the *2001* [~~2000~~] *Accountability Manual* is available for examination during regular office hours, 8:00 a.m. to 5:00 p.m., except holidays, Saturdays, and Sundays, at the Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701. In addition, the publication can be accessed from the Texas Education Agency official website.

(b) The commissioner of education shall amend *Part 1* of the *2001* [~~2000~~] *Accountability Manual* and this section adopting it by reference, as needed.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101768
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 463-9701

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 250. AGENCY ADMINISTRATION

SUBCHAPTER D. NEGOTIATION AND MEDIATION PROCEDURES RELATING TO CERTAIN CONTRACT DISPUTES

19 TAC §§250.40 - 250.49

On January 5, 2001, the State Board for Educator Certification (SBEC) proposed new 19 Texas Administrative Code Chapter 250, Subchapter D, §§250.40 - 250.49, relating to the negotiation and resolution of certain contract claims against SBEC.

Passed in 1999 by the 76th Legislature, Chapter 2260 of the Government Code governs the resolution of certain contract claims against the State of Texas. Texas Section 2260.052(c) of that act requires SBEC to adopt rules for settling breach of contract claims against the agency. The Office of the Attorney General and the State Office of Administrative Hearings have jointly developed model rules to guide agencies, which may modify them in conformity with statute. SBEC's proposal modifies the model rules by allowing the parties by agreement to apply the rules to contract claims brought by SBEC against a contractor, rather than just to claims brought against the agency by a contractor.

The proposed rules, along with Chapter 2260 of the Government Code, would establish for SBEC the following five-stage resolution process for breach of contract claim and counterclaims:

1. Notice of claim or counterclaim delivered by one contracting party to the other. (SBEC proposed rule.)

2. Negotiation of dispute just between SBEC and the contractor. (SBEC proposed rule.)

3. Mediation facilitated by neutral third party of any unresolved issues following negotiation. (SBEC proposed rule.)

4. Administrative Hearing before the State Office of Administrative Hearings (SOAH) of issues left unresolved following negotiation and mediation. (Referral to SOAH: SBEC proposed rule. Conduct of hearing: Statutory provisions and SOAH procedural rules.)

5. Administrative decision by SOAH as to whether SBEC shall pay a pending claim for damages of less than $250,000. SOAH's decision would not be appealable or otherwise subject to judicial review. (Statutory provisions.) OR

Report and recommendation to the Legislature by SOAH that a pending claim against SBEC for damages of over $250,000 either (1) should be paid; or (2) payment and permission to sue the State should be denied. (Statutory provisions.)

No fiscal impact is anticipated for the new contract settlement rules. SBEC has not had any contract claims filed against the agency, so it cannot be determined at this time how much the proposed procedures would save. SBEC expects to settle any claims that do arise within amounts already budgeted for the contract project and to receive full value for the contracted goods or services.

Barry Alaimo, Director of Accounting and Financial Operations, was responsible for preparing this fiscal-impact note.

The public would benefit from the new rules by allowing SBEC to efficiently resolve contract claims without compromising the agency operations. The public should incur no additional costs as a result of the implementation of the proposed rules. There will be no effect on small businesses.

Dan Junell, General Counsel, was responsible for preparing this public benefits and costs note.

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, Texas 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: "Comments on proposed new 19 TAC Chapter 250, Subchapter D, relating to contract-claim resolution."

The new rules were proposed under the authority of Chapter 2260 of the Government Code, which governs the resolution of certain contract claims against the State of Texas. Section 2260.052(c) of that act requires SBEC to adopt rules for settling breach of contract claims against the agency. The rules were also proposed under §21.041(b)(1) of the Education Code, which requires SBEC to propose rules that provide for the general administration of the agency.

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

§250.40. General.

(a) Policy. It is the policy of the State Board for Educator Certification that contract disputes involving the agency be resolved as fairly and expeditiously as possible.

(b) Purpose. The purpose of this subchapter is to establish procedures to resolve certain contract disputes between contractors and the State Board for Educator Certification (SBEC).

(c) Scope and applicability. This subchapter applies to certain breach of contract claims and counterclaims involving the State Board for Educator Certification. This subchapter does not apply to:

(1) contracts between SBEC and another governmental body;

(2) contracts between a subcontractor and contractor;

(3) a grant agreement between SBEC as grantor and a public or private entity as grantee;

(4) a claim for personal injury or wrongful death arising from the breach of a contract; or

(5) a claim or dispute with respect to which the 77th Legislature or a previous legislature has enacted a concurrent resolution granting permission to the contractor to bring a suit against the state or SBEC.

(d) Legal authority. Government Code, §2260.052(c) requires the Board to adopt rules for negotiation and mediation of certain breach of contract claims and counterclaims involving contractors and the State of Texas. Education Code, §21.041(a) authorizes the Board to adopt rules as necessary for its own procedures and §21.041(b)(1) requires the Board to propose rules for the general administration of its organic statutes, Education Code, Chapter 21, Subchapter B.

(e) Exclusive procedures. In accordance with Civil Practice and Remedies Code, Chapter 107, relating to permission to sue the state, this subchapter contains the exclusive and required prerequisites to suit for breach of contract by a contractor against SBEC.

(1) By written agreement of the parties, this subchapter may be applied to a breach of contract claim brought by SBEC against a contractor.

(2) Nothing in this subchapter precludes SBEC from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

(f) Sovereign immunity. This subchapter does not waive sovereign immunity to suit or liability.

(g) Delivery of papers. Delivery of notices and other papers required under this subchapter shall be made by hand delivery (courier receipt requested), certified mail (return receipt requested), or other verifiable delivery service.

(1) Delivery to SBEC shall be made to the agency's executive director.

(2) Delivery to the contractor shall be made to the contractor's representative designated in the contract for receipt of papers under this subchapter or to the contractor's chief executive officer or registered agent for delivery of service if a representative is not so designated in the contract.

§250.41. Definitions.

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

(1) Agency--The State Board for Educator Certification.

(2) ALJ--An individual appointed by the chief administrative law judge of SOAH under Government Code, §2003.041.

(3) APA--The Administrative Procedure Act, codified as Government Code, Chapter 2001.

(4) Board--The State Board for Educator Certification.

(5) Contested case--A proceeding brought pursuant to this subchapter in which the legal rights, duties, or privileges of a party are to be determined by the Board or SOAH or both after an opportunity for an adjudicative hearing.

(6) Contract--A written agreement between SBEC and a contractor by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or by lease, to SBEC; or

(B) to perform a project as defined by Government Code, §2166.001, relating to building construction and acquisition.

(7) Contractor--Independent contractor who has entered into a contract directly with the agency. The term does not include:

(A) a contractor's subcontractor, officer, employee, agent, or other person furnishing goods or services to a contractor;

(B) an employee of SBEC or another unit of state government; or

(C) a student at an institution of higher education.

(8) Day--A calendar day, unless otherwise indicated.

(9) Dispute--A contested legal or factual issue involving a breach of contract claim or counterclaim.

(10) Institution of higher education--Any public technical institute, public junior college, public senior college or university, medial or dental unit, or other agency of higher education as defined by the Education Code, §61.003.

(11) Mediation--A non-adversarial approach to disputes that seeks a collaboratively reached consensual solution to conflicts through the assistance of a third-party neutral, who guides participants through a confidential process designed to facilitate understanding of parties' real interests and conscious exploration of alternative solutions.

(12) Negotiation--A process whereby SBEC and the contractor come together to discuss potential solutions to the dispute.

(13) Party to the contract or Party--A contractor or SBEC; a "neutral third party" refers to a mediator.

(14) Representative--A person authorized to represent SBEC or a contractor in matters arising under this subchapter.

(15) SBEC--The State Board for Educator Certification.

(16) SOAH--The State Office of Administrative Hearings.

§250.42. Dispute Resolution Process.

(a) If any disputes arise relating to contracts between SBEC and a contractor, the parties shall attempt to resolve those disputes first by negotiation, by mediation if the parties are unable to resolve the disputes through negotiation, and lastly by a contested hearing before SOAH if the parties are unable to resolve the disputes by mediation.

(b) A settlement agreement reached under this subchapter will be final and binding on the parties. The settlement agreement shall be in writing and signed by representatives of SBEC and the contractor with authority to bind the parties.

(1) The parties shall disclose their settlement approval procedures to each other prior to negotiation or mediation.

(2) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the

issues that are not resolved. A partial settlement does not waive a contractor's rights under Government Code, Chapter 2260, as to the parts of the claim that are not resolved.

(3) Any settlement to be paid by SBEC is subject to the availability of funds appropriated to the agency.

(4) The confidentiality of a final settlement agreement to which SBEC is a signatory is governed by Government Code, Chapter 552, the Texas Public Information Act.

(c) The parties may act through their representatives in pursuing resolution of a claim or counterclaim under this subchapter.

(1) The parties shall select representatives who have knowledge about the dispute and who are in a position to reach agreement or can credibly recommend approval of an agreement, with the understanding that the agreement may have to be approved by others with SBEC or the contractor or other state officials, others with a company, corporation, or within the contracting entity.

(2) Limitations on the settlement authority, if any, of a representative participating in a negotiation or mediation shall be disclosed as soon as possible by that individual to a representative of the other party.

(d) The parties shall refrain from litigation during the resolution process insofar as they can do so without prejudicing their legal rights.

§250.43. Required Contract Provisions.

(a) Each contract that SBEC enters into to which these procedures apply shall include as a term of the contract the following provisions:

(1) Negotiation:

(A) "Both parties agree they will first attempt to resolve any disputes relating to this contract through negotiations pursuant to SBEC's negotiation procedures relating to certain contract disputes."

(B) "Both parties agree that SBEC shall file any agency counterclaim in accordance with SBEC's above-referenced negotiation procedures."

(2) Mediation: "Both parties agree that if they are unable to resolve completely the dispute during negotiation, the parties shall invoke SBEC's mediation procedures relating to certain contract disputes for the portions of the claim that remain unresolved."

(3) Contested case hearing: "Both parties agree that if any unresolved issues remain following negotiation and mediation efforts, the contractor shall request an administrative hearing in accordance with SBEC's contested hearing procedures relating to certain contract disputes. The contractor's failure to request such a hearing is a waiver of claim as to the unresolved issues."

(b) In each contract with SBEC, a contractor shall designate a representative to receive papers delivered under this subchapter.

(c) Even in the absence of a contractual provision to do so, SBEC and the contractor may apply the procedures in this subchapter to resolve a breach of contract claim if they agree in writing to do so, subject to the limitations imposed by §250.40(c) of this title (relating to General).

§250.44. Damages.

(a) The total amount of money recoverable on a claim for breach of contract under these procedures may not, after deducting the amount specified in subsection (b) of this section, exceed the balance due and owing on the contract price, including orders for additional work, services, or goods.

(b) Any amount owed to SBEC for work not performed or goods not delivered under a contract or in substantial compliance with its terms shall be deducted from the amount in subsection (a) of this section.

(c) Any award of damages under these procedures may not include:

(1) consequential or similar damages;

(2) exemplary damages;

(3) any damages based on an unjust enrichment theory;

(4) attorney's fees; or

(5) home office overhead.

§250.45. Notice of Claim or Counterclaim.

(a) Notice of claim of breach of contract. To assert a breach of contract claim against SBEC, a contractor must deliver notice of the claim to SBEC in accordance with the provisions of this subsection or the claim is waived. The notice of claim of breach of contract must:

(1) be in writing;

(2) state with particularity:

(A) the name and address of the contractor and the contractor's representative;

(B) the nature of the alleged breach, including a detailed description of each event that the contractor claims breached the contract, the identity of any witnesses to the event, the date of each such event, and the identity of each contract provision allegedly breached;

(C) a description of damages that includes the amount and method used to calculate those damages; and

(D) the legal theory of recovery, i.e., breach of contract, including the relationship between the alleged breach and the damages claimed; and

(3) be delivered to SBEC's executive director not later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

(b) Notice of Counterclaim. SBEC may counterclaim in opposition to or deduction from a contractor's claim of breach of a contract between the contractor and SBEC. The notice of counterclaim under this subsection must:

(1) be in writing;

(2) state with particularity:

(A) the name and address of SBEC's representative;

(B) the nature of the counterclaim;

(C) a description of damages or offsets, including the amount and method used to calculate those damages or offsets; and

(D) the legal theory supporting the counterclaim; and

(3) be delivered to the contractor no later than 90 days after SBEC receives the contractor's notice of claim.

§250.46. Duty to Negotiate.

The parties shall negotiate in accordance with the timetable set forth in §250.47 of this title (relating to Negotiation Timetable), to attempt to resolve all claims and counterclaims filed under this chapter. No party is obligated to settle with the other party as a result of the negotiation.

§250.47. Negotiation Timetable.

(a) Following receipt of a contractor's notice of claim, SBEC shall review the contractor's claim and the agency's counterclaim, if any, and initiate negotiations with the contractor to attempt to resolve the claim and counterclaim.

(b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 60 days following the later of:

(1) the date of termination of the contract;

(2) the completion date, or substantial completion date in the case of construction projects, in the original contract; or

(3) the date SBEC receives the contractor's notice of claim.

(c) SBEC may delay negotiations until after the 180th day after the date of the event giving rise to the claim of breach of contract by:

(1) delivering written notice to the contractor that the commencement of negotiations will be delayed; and

(2) delivering written notice to the contractor when SBEC is ready to begin negotiations.

(d) The parties may conduct negotiations according to an agreed schedule as long as they begin negotiations no later than the applicable deadlines set forth in subsection (b) or (c) of this section, whichever is applicable.

(e) Subject to subsection (f) of this section, the parties shall complete the negotiations that are required by this chapter as a prerequisite to a contractor's request for contested case hearing no later than 270 days after SBEC receives the contractor's notice of claim.

(f) The parties may agree in writing to extend the time for negotiations on or before the 270th day after SBEC receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party.

§250.48. Mediation.

(a) Mediation timetable. SBEC and the contractor may agree to mediate the dispute at any time before the 270th day after the date a claim is filed under this subchapter or before the expiration of any extension agreed to in writing by the parties to the contract.

(1) SBEC and the contractor may mediate the dispute even after the case has been referred to SOAH for a contested case hearing. SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, regardless of whether the parties have previously attempted mediation.

(2) In setting the time period for the duration of the mediation, SBEC and the contractor should allow enough time in which to make arrangements with mediator and the attending representatives to schedule the mediation, to attend and to participate in the mediation, and to complete any settlement approval procedures necessary to achieve final settlement.

(b) Conduct of mediation. Mediation is a consensual, confidential process in which an impartial third person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. The mediation is nonbinding and subject to Government Code, Chapter 2009, the Governmental Dispute Resolution Act.

(c) Qualifications, standards, and immunity of mediator. The mediator must be acceptable to both parties, subject to the authority of SOAH to appoint a mediator in a contested case referred to mediation. To qualify as a mediator under this subchapter, a person must have completed a minimum of 40 classroom hours of training in dispute resolution techniques in a course conducted by a county alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152, or other dispute resolution organization approved by SOAH.

(1) The mediator shall be subject to the standards and duties prescribed by Civil Practice and Remedies Code, §154.053, including the following:

(A) A mediator shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(B) Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(2) SBEC and the contractor should decide whether, and to what extent, knowledge and experience in mediation of the subject matter at issue would be required or preferred of the mediator.

(3) A volunteer mediator shall have, if applicable, the qualified immunity prescribed by Civil Practice and Remedies Code, §154.055, which provides that a person appointed to facilitate an alternative dispute resolution procedure under this subchapter, or appointed by the parties whether before or after the institution of formal judicial proceedings, who is a volunteer and who does not act with wanton and willful disregard of the rights, safety, or property of another, is immune from civil liability for any act or omission within the course and scope of his or her duties or functions as mediator. For purposes of this paragraph, a volunteer mediator is a person who does not receive compensation in excess of reimbursement for expenses incurred or a stipend intended as reimbursement for expenses incurred.

(d) Source of Mediator. Subject to the requirements of subsection (c) of this section, relating to qualifications, standards, and immunity of mediator, SBEC and the contractor may obtain the services of a mediator through an agreement with:

(1) a governmental officer or employee or private individual who is qualified as a mediator under this subsection;

(2) SOAH;

(3) the Center for Public Policy Dispute Resolution at the University of Texas School of Law;

(4) a county alternative dispute resolution system created under Civil Practice and Remedies Code, Chapter 152; or

(5) another state or federal agency or through a pooling agreement among several governmental bodies.

(e) Agreement to mediate. The mediation agreement shall be in writing and executed by both parties to the contract. At a minimum, the agreement must address the following factors:

(1) the identity of the mediator;

(2) the time period for the mediation;

(3) the location of the mediation;

(4) the allocation of costs of the mediator;

(5) the identity of representatives who will attend the mediation on behalf of the parties by name and position within SBEC or the contractor's organization; and

(6) the settlement approval process in the event the parties reach agreement at the mediation.

(f) Confidentiality of mediation. A mediation conducted under this subchapter is confidential in accordance with §2009.054,

Government Code, relating to confidentiality of certain records and communications made during alternative dispute resolution procedures. Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including an appointing ALJ.

(g) Each participant in the mediation, including the mediator, is subject to the requirements of Family Code, Chapter 261, Subchapter B, relating to reports of child abuse or neglect, and of Human Resources Code, Chapter 48, Subchapter C, relating to reports of abuse, neglect, or exploitation of elderly or disabled persons.

(h) Any settlement agreement reached during a mediation shall be signed by representatives of the contractor and the unit of state government, and shall describe any procedures that the parties must follow to obtain final and binding approval of the agreement.

(i) Costs of mediation. Unless SBEC and the contractor agree otherwise, the costs of the mediation process itself shall be divided equally between the parties. Each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, attorney's fees, and consultant or expert fees.

§250.49. Referral to the State Office of Administrative Hearings.

(a) If mediation does not resolve all disputed issues, the contractor may request SBEC to refer the dispute to SOAH. On its own initiative, with or without a request from the contractor, SBEC may refer the dispute to SOAH. Before the dispute may be referred to SOAH for contested case proceedings, SBEC or the contractor must determine that mediation has failed to resolve the dispute in whole or in part and deliver written notification of such determination to the other party.

(b) The contractor's request under this section must be in writing and received by SBEC within 30 days after SBEC or the contractor receives written notification from the other party that mediation has failed to resolve the dispute in whole or in part. The request must:

(1) state the factual and legal basis for the claim or counterclaim; and

(2) request that the claim be referred to the State Office of Administrative Hearings for a contested case hearing.

(c) SBEC's notice of intent to refer the dispute to SOAH must be in writing and received by the contractor within 30 days after SBEC or the contractor receives written notification from the other party that mediation has failed to resolve the dispute in whole or in part. The notice must:

(1) state the factual and legal basis for the claim or counterclaim; and

(2) state that the matter is being referred to the State Office of Administrative Hearings for a contested case hearing.

(d) Within 20 days of receiving the contractor's request for referral of the dispute to SOAH or of delivering to the contractor SBEC's intent to refer the dispute to SOAH, SBEC shall deliver to SOAH a request to docket the dispute for a contested case hearing. Proceedings before SOAH shall be governed by the APA and applicable SOAH rules and procedures.

(e) Subject to SOAH's rules, nothing in this subchapter prohibits SBEC and the contractor from negotiating or mediating a resolution of their dispute after the case has been referred for contested case hearing.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101756
Pamela B. Tackett
Executive Director
State Board for Educator Certification
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 469-3011

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TITLE 22. EXAMINING BOARDS

PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

CHAPTER 235. LICENSING

SUBCHAPTER D. ISSUANCE OF LICENSES

22 TAC §235.46

The Board of Vocational Nurse Examiners proposes amendment of §235.46 relating to Notification of Name or Address. The amendment will address required documents for a name change. The amendment also has new language relating to address changes to comply with compact rules.

Mary M. Strange, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing the rule.

Mrs. Strange has also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be consistency in the rules. There will be no effect on small business. There is no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments may be submitted to Mary M. Strange, Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701.

The amendment is proposed under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article, or code will be affected by this proposal.

§235.46. Notification of Change of Name or Address.

A sworn affidavit, marriage license, marriage registration,divorce decree, [~~or~~] legal court order, driver's license, and or social security card attesting to the name change[~~setting out change of name will be submitted to the Board by the licensee, as appropriate~~]. A fee is required for a name change and an additional fee for a duplicate license or temporary permit reflecting the change. If the change occurs at the time of renewal there will be no additional charge other than the renewal fee. Notification of change of address shall be submitted in writing to the Board by each licensee within 10 days of change. If the change of address is to another state, the licensee must include a declaration of primary state of residence. There will be no additional charge for updating address

information for moves within the state of Texas. [~~However,~~] A new license will not be issued for an address change within the state of Texas only. Individuals declaring a non-Compact state as their primary state of residence shall be charged a fee for a duplicate license or temporary permit. The license of individuals declaring a Compact state as their primary state of residence shall become invalid, in compliance with the Compact rules.

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

Filed with the Office of the Secretary of State, on March 21, 2001.

TRD-200101627
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-7653

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CHAPTER 239. CONTESTED CASE PROCEDURE
SUBCHAPTER D. INFORMAL DISPOSITIONS

22 TAC §239.51

The Board of Vocational Nurse Examiners proposes amendment of §239.51 relating to Agreed Orders. The amendment of this rule will allow the business of the Board to continue, especially the Informal Hearings, in the temporary absence of an Executive Director.

Mary M. Strange, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing the rule.

Mrs. Strange has also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be consistency in the rules. There will be no effect on small business. There is no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments may be submitted to Mary M. Strange, Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701.

The amendment is proposed under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article, or code will be affected by this proposal.

§239.51. Agreed Orders.

The Executive Director or designee, may negotiate a proposed Agreed Order with any person subject to the jurisdiction of the Board, the terms of which shall be approved by the Executive Director or designee, prior to presentation of the proposed Agreed Order to the Board for its consideration. The Executive Director and/or the Board shall appoint the designee. A proposed Agreed Order shall have no effect until such time as the Board may, at a regularly scheduled meeting, take actin approving the proposed Agreed Order. Should the Board fail to approve a proposed Agreed order as presented, it may thereafter consider the complaint at a contested case hearing, upon notice to the respondent/applicant named in the complaint.

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

Filed with the Office of the Secretary of State, on March 21, 2001.

TRD-200101626
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-7653

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT
SUBCHAPTER B. PROFESSIONAL STANDARDS

22 TAC §501.62

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.62 concerning Other Professional Standards.

The amendment to § 501.62 will add standards for tax services to the Board's list of professional standards it expects licensees to satisfy.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the amendment will be zero because the Board's licensees should have been meeting this standard.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be zero because the Board's licensees should have been meeting this standard.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the rule will be zero because the Board's licensees should have been meeting this standard.

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be that all consumers and licensees will know that there are professional standards in the tax area that licensees should be satisfying.

The probable economic cost to persons required to comply with the amendment will be zero because the Board's licensees should have been meeting this standard.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on Monday April 23, 2001. Comments should be addressed to Amanda G. Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses because the Board's licensees should have been meeting this standard.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small business; if the amendment is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the amendment is to be adopted; and if the amendment is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the amendment under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The amendment is proposed under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 1999) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§501.62. Other Professional Standards.

A certificate or registration holder in the performance of consulting services, accounting and review services, [~~or~~] any other attest service , or tax services shall conform to the professional standards applicable to such services. For purposes of this section, such professional standards are considered to be interpreted by:

(1) Statements on Standards on Consulting Services (SSCS) issued by the American Institute of Certified Public Accountants;

(2) Statements on Standards for Accounting and Review Services (SSARS) issued by the American Institute of Certified Public Accountants;

(3) Statements on Standards for Attestation Engagements (SSAE) issued by the American Institute of Certified Public Accountants; [~~or~~]

(4) Statements on Standards for Tax Services issued by the American Institute of Certified Public Accountants; or

(5) [~~(4)~~]similar pronouncements by other entities having similar generally recognized authority.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101764

William Treacy
Executive Director
Texas State Board of Public Accountancy
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-7848

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CHAPTER 523. CONTINUING PROFESSIONAL EDUCATION

SUBCHAPTER B. CONTINUING PROFESSIONAL EDUCATION STANDARDS

22 TAC §523.32

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

The Texas State Board of Public Accountancy (Board) proposes the repeal of §523.32 concerning Ethics Course.

The proposed repeal of §523.32 will remove a rule that needs to be rewritten from the beginning.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed repeal will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the repeal will be zero because the repeal does not require anyone to do or not do anything.

B. the estimated reductions in costs to the state and to local governments as a result of enforcing or administering the repeal will be zero because the repeal does not require anyone to do or not do anything.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the repeal will be zero because the repeal does not require anyone to do or not do anything.

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of adoption of the proposed repeal will be that an old rule that needs to be rewritten will be removed from the Board's rules.

The probable economic cost to persons required to comply with the repeal will be zero because the repeal does not require anyone to do or not do anything.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

Mr. Treacy has determined that the proposed repeal will not have an adverse economic effect on small businesses because the repeal does not require anyone to do or not do anything.

The Board requests comments on the substance and effect of the proposed repeal from any interested person. Comments must be received at the Board no later than noon on Monday April 23, 2001. Comments should be addressed to Amanda G. Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 3057-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed repeal will have an adverse economic effect on small business; if the repeal is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the repeal is to be adopted; and if the repeal is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the repeal under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The repeal is proposed under the Public Accountancy Act, Texas Civil Statutes, Article 41a-1, 6(a) (Vernon Supp. 1998), which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

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

§523.32. Ethics Course.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101767
William Treacy
Executive Director
Texas State Board of Public Accountancy
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-7848

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The Texas State Board of Public Accountancy (Board) proposes new §523.32 concerning Board Rules and Ethics Course.

The new §523.32 will inform licensees and license applicants that the Board expects them to complete a Continuing Professional Education course on the Board's Rules and states the exceptions.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be zero because this rule is a rewrite of part of former §523.32 and does not require anyone to do anything they are not already doing.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be zero because this rule is a rewrite of part of former §523.32 and does not require anyone to do anything they are not already doing.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the rule will be zero because this rule is a rewrite of part of former §523.32 and does not require anyone to do anything they are not already doing.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be that this rule will be clearer, better written and will contain fewer subject areas than the former Board Rule.

The probable economic cost to persons required to comply with the new rule will be zero because this rule is a rewrite of part of former §523.32 and does not require anyone to do anything they are not already doing.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because this rule is a rewrite of part of former §523.32 and does not require anyone to do anything they are not already doing.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday April 23, 2001. Comments should be addressed to Amanda G. Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rule is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 1999) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and Section 901.253 which authorizes the Board to ensure that an applicant is of good moral character.

No other article, statute or code is affected by this proposed new rule

§523.32. Board Rules and Ethics Course.

(a) An individual applying for certification or registration must complete a board-approved four-hour ethics course on the Rules of Professional Conduct no more than six months prior to submission of the application. Proof of completion of this course must be submitted with the application.

(b) Every licensee must take a board-approved two-hour ethics course on the Rules of Professional Conduct every three years. Licensees shall report completion of the course on the annual license renewal notice at least every third year.

(c) A licensee granted retired, permanent disability, or other exempt status is not required to complete the ethics course during the licensee's exempt status. When the exempt status is no longer applicable, the individual must complete either a board-approved four-hour ethics course or a board-approved two-hour ethics course, whichever is applicable, and report it on the license renewal notice if due.

(d) A certificate or registration holder who resides in the state of Texas may not take the ethics course via self-study but must take the ethics course in a live instructor format or in an interactive computer-based format.

(e) A certificate or registration holder who does not reside in the state of Texas may take the course in either a live instructor format

or a computer-based interactive format or may write the board to request an exemption.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101763
William Treacy
Executive Director
Texas State Board of Public Accountancy
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-7848

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22 TAC §523.33

The Texas State Board of Public Accountancy (Board) proposes new §523.33 concerning Course Content and Board Approval.

The new §523.33 will contain part of former §523.32. The new rule informs course providers what the Board expects this course to contain.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rule will be zero because part of this rule is a rewrite of former §523.32, and because the new rule does not require anyone to do anything they are not already doing.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rule will be zero because part of this rule is a rewrite of former §523.32, and because the new rule does not require anyone to do anything they are not already doing.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the rule will be zero because part of this rule is a rewrite of former §523.32, and because the new rule does not require anyone to do anything they are not already doing.

Mr. Treacy has determined that for the first five-year period the new rule is in effect the public benefits expected as a result of adoption of the proposed new rule will be that this rule will be clearer, better written and will contain fewer subject areas than the former Board rule.

The probable economic cost to persons required to comply with the new rule will be zero because part of this rule is a rewrite of former §523.32, and because the new rule does not require anyone to do anything they are not already doing.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

Mr. Treacy has determined that the proposed new rule will not have an adverse economic effect on small businesses because part of this rule is a rewrite of former §523.32, and because the new rule does not require anyone to do anything they are not already doing.

The Board requests comments on the substance and effect of the proposed new rule from any interested person. Comments must be received at the Board no later than noon on Monday April 23, 2001. Comments should be addressed to Amanda G. Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rule will have an adverse economic effect on small business; if the new rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the new rule is to be adopted; and if the new rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the new rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The new rule is proposed under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 1999) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and Section 901.253 which authorizes the Board to ensure that an applicant is of good moral character.

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

§523.33. Course Content and Board Approval.

(a) Before a provider of continuing professional education can offer the Board Rules and Ethics Course, the content of the course must be submitted to and approved by the continuing professional education committee of the board for initial approval and every three years thereafter. Course content shall be approved only after demonstrating, either in a live instructor format or a computer-based interactive format, as defined in §523.1(b)(5) of this title (relating to Continuing Professional Education Purpose and Definitions), that the course contains the underlying intent established in the following criteria.

(1) The course shall encourage the certificate or registration holder to educate himself or herself in the ethics of the profession, specifically the Rules of Professional Conduct of the board.

(2) The course shall convey the intent of the board's Rules of Professional Conduct in the certificate or registration holder's performance of professional services, and not mere technical compliance. A certificate or registration holder is expected to apply ethical judgment in interpreting the rules and determining the public interest. The public interest should be placed ahead of self-interest, even if it means a loss of job or client.

(3) The primary objectives of the Board Rules and Ethics Course shall be to:

(A) emphasize the ethical standards of the profession, as described in this section; and

(B) review and discuss the board's Rules of Professional Conduct and their implications for certificate or registration holders in a variety of practices, including:

(i) a certificate or registration holder engaged in the client practice of public accountancy who performs attest and non-attest services, as defined in §501.52 of this title (relating to Definitions);

(ii) a certificate or registration holder employed in industry who provides internal accounting and auditing services; and

(iii) a certificate or registration holder working in education or in government accounting or auditing.

(4) The Board Rules and Ethics Course shall meet the requirements of the board's continuing professional education rules as described in this chapter (relating to Continuing Professional Education). Prior to offering and scheduling an approved Board Rules and Ethics Course, a sponsor shall:

(A) ensure that the instructor is a certified public accountant licensed in Texas or that the instructor is team teaching with a certified public accountant licensed in Texas and that both have completed the board's ethics training program at least every three years or as required by the board. This subsection is prospective only;

(B) ensure that the instructor's certificate or license has never been suspended or revoked for violation of the Rules of Professional Conduct; and

(C) provide its advertising materials to the board's CPE Committee for approval. Such advertisements shall:

(i) avoid commercial exploitation;

(ii) identify the primary focus of the course; and

(iii) be professionally presented and consistent with the intent of §501.82 of this title (relating to Advertising).

(b) Board Rules and Ethics Courses will be reevaluated every three years or as required by the board.

(c) At the conclusion of each course, the sponsor shall administer a test to determine whether the program participants have obtained a basic understanding of the course content, including the need for a high level of ethical standards in the accounting profession.

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

Filed with the Office of the Secretary of State, on March 26, 2001.

TRD-200101762
William Treacy
Executive Director
Texas State Board of Public Accountancy
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 305-7848

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PART 25. STRUCTURAL PEST CONTROL BOARD

CHAPTER 593. LICENSES

22 TAC §593.5

The Structural Pest Control Board proposes amendments of 22 TAC §593.5 concerning Examinations. The proposal re-inserts the requirement that applicants for exam complete a Board approved certified noncommercial applicator training course prior to testing.

Benny M. Mathis, Executive Director has determined that there will not be fiscal implications as a result of enforcing or administering the rule.

There will be no estimated additional cost, estimated reduction in cost or estimated loss or increase in revenue to state or local government for the first five year period the rule will be in effect.

There will be no cost of compliance with the rule for small businesses.

There will be no cost per employee, cost per hour of labor or cost per $100 of sales for small or larger businesses.

Benny M. Mathis, Executive Director 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 as proposed will be the clarification of exam requirements for the pest control industry thus benefiting the public they serve. There is no anticipated economic cost to individuals required to comply with the rule as proposed.

Comments on the proposal may be submitted to Frank M. Crull, General Counsel, Structural Pest Control Board, 1106 Clayton Lane #100LW, Austin, Texas 78723.

The amendment is proposed under Tex.Rev.Civ.Stat.Ann., Article 135b-6, which provides the Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

No other statute, code or article is affected by this proposed amendment. 593 Licenses

§593.5. Examinations.

(a) An individual who has previously qualified by written exam in a category shall receive a certified applicators license for the qualified category without reexamination upon renewal of a certified applicator license and meeting all requirements of the regulations. Each individual not previously qualified by written examination in the category or categories for which the license is requested must secure a certified applicator license by passing an exam administered by the Board.

(b) In order to qualify to take the Board exam for obtaining a certified commercial applicator license, the applicant must have verifiable employment in the pest control industry under the supervision of a licensed certified commercial applicator for at least twelve (12) months out of the past twenty-four (24) months and must have possessed a technician license for at least six (6) months.

(1) The proof of previous verifiable employment or experience in the industry or technical field experience of at least twelve (12) months out of the past twenty-four (24) months from a previous occupation shall be furnished by the applicant

(2) The following persons with less than twelve (12) months verified employment and who have not been licensed as a technician for six (6) months may apply to the Board for permission to take the test:

(A) an applicant with a degree in the biological sciences from an accredited college or university;

(B) an applicant with technical field experience from a previous occupation; and

(C) an applicant who qualifies under the hardship clause outlined in these regulations.

(c) The testing procedure will be as follows:

(1) Examinations will be given at the discretion of the Board at least once each quarter based on the calendar year.

(2) A fee shall be charged for each examination administered by the Board.

(3) All examination fees are to be paid by the method determined by the Board and payment should be submitted with the completed application.

(4) All examinations shall be maintained and administered by the Board. Complete examinations shall be retained by the director for a period of two years.

(5) The applicant shall take an examination which shall be in written form and, in general, cover the subject of the services designated in the application, except those covered by endorsement of license.

(6) A grade of 70% will be the minimum grade required for passing.

(7) The applicant for the certified applicator examination must be able to read and write the English language.

(8) An applicant who gives or receives unauthorized assistance during an examination shall be dismissed from the examination and results of that applicant's examination shall be voided.

(9) Applicants who do not take a scheduled exam may not receive a refund of their exam fee unless they notify the Board in writing at least ten (10) business days in advance of the exam date. Exceptions may be granted if there is an emergency such as a death or serious illness in the family.

(10) Persons who make a passing grade and qualify for a certified applicator license must obtain a license within twelve (12) months of the exam date or be retested.

(11) Categories in which examinations are to be given for which licenses will be issued are as follows.

(A) Termite and Wood Destroying Insect Control--This category includes persons engaged in the inspection and/or control of termites, beetles, or other wood destroying insects and wood preservation by means other than fumigation in buildings, including homes, warehouses, stores, docks, or any other structures.

(B) Pest Control -- his category includes persons engaged in the inspection and/or control of insect pests in and around structures or pest animals which may invade homes, restaurants, stores, and other buildings, attacking their contents or furnishings or being a general nuisance, but do not normally attack the building itself. Examples of such pests are cockroaches, silverfish, ants, flies, mosquitoes, rats, mice, etc.

(C) Lawn and ornamental--This category includes persons engaged in the inspection and/or control of pests and/or diseases of trees, shrubs, or other plantings in a park or in and around structures, business establishments, industrial parks, institutional buildings or streets.

(D) Structural Fumigation--This category includes persons engaged in pest inspection and/or control through fumigation of structures not primarily intended to contain food, feed or grains.

(E) Commodity Fumigation--This category includes persons engaged in pest inspection and/or control through fumigation of commodities and/or structures normally used to contain commodities.

(F) Weed Control--This Category includes persons engaged in the inspection and/or control of weeds around homes and industrial environs.

(G) Wood Preservation--This category includes persons engaged in that phase of pest control that involves the addition of preservatives to wood products to extend the life of the wood products by protecting them from damage caused by insects, fungi, and marine borers. Examples of wood products may include, crossties, poles, and posts. This category is intended only for use by those persons using wood preservatives that may be classified as Restricted Use.

(12) Each applicant testing for a certified applicator license must pass the general standards exam administered by the Board to be eligible to be licensed in any of the categories in paragraph (11) of this subsection

(d) In order to qualify to take the Board exam for obtaining a Certified Noncommercial Applicators license as provided by subsection (c) of this section, the applicant must meet one of the following requirements:

(1) be an applicant with a degree in the biological sciences from an accredited college or university;

(2) be an applicant with a verifiable statement showing technical field experience and completion of a Board approved Certified Noncommercial Applicator training course within at least twelve (12) months out of the past twenty-four (24) months; or

(3) complete a Board approved certified noncommercial Technician training course;

(4) [~~(3)~~] be a licensed Noncommercial Technician for at least six (6) months and have been employed to perform pest control services under the supervision of a licensed Certified Noncommercial Applicator for at least twelve (12) months out of the last twenty-four (24) months.

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

Filed with the Office of the Secretary of State, on March 20, 2001.

TRD-200101588
Benny M. Mathis, Jr.
Executive Director
Structural Pest Control Board
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 451-7200

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 3. MASS EMISSIONS CAP AND TRADE PROGRAM

30 TAC §101.351

The Texas Natural Resource Conservation Commission (commission) proposes an amendment to §101.351, Applicability.

The amended section will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

On December 6, 2000, the commission adopted rules which established a program of emissions capping and trading as part of the Houston/Galveston (HGA) SIP for the control of ozone. These rules were published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 283). In the preamble for these rules, under the SECTION BY SECTION discussion of §101.351, the commission stated its intent to propose an amendment to §101.351 shortly after the adoption of the cap and trade program rules. The commission believed that the amendment would be necessary to specify that the requirement to operate under the cap and trade program applied to all facilities which emit nitrogen oxides (NO_x) in the HGA area with emission standards under Chapter 117, Control of Air Pollution from Nitrogen Compounds and which are located at a site where their collective design capacity to emit NO_x is ten tons or more per year. Section 101.351, as adopted on December 6, 2000, was proposed with language which could be interpreted to limit the application of the cap and trade program to individual facilities which have a NO_x design capacity of ten tons or more per year.

This proposal would apply the requirements of Chapter 101, Subchapter H, Emissions Banking and Trading, Division 3, Mass Emissions Cap and Trade Program to facilities emitting NO_x located at a single site in the HGA area with emission standards under Chapter 117 and which have a collective design capacity to emit ten tons of NO_x or more per year. The commission believes that the intended applicability of the cap and trade has been made clear not only in the preamble that accompanied the December 6, 2000 rules, but also in the SIP adopted on the same date and in numerous contacts with representatives of the intended affected sources in the HGA area.

SECTION BY SECTION DISCUSSION

The proposed amendment to §101.351 would state that the requirements of Chapter 101, Subchapter H, Division 3 would apply to all stationary facilities which emit NO_x with emission specifications under §§117.106, 117.206, and 117.475 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Attainment Demonstration; and Emission Specifications) which are located at a site where they collectively have a design capacity to emit ten tons or more per year of NO_x. The amendment would require the owner or operator of facilities at a site to obtain and use allowances for actual total NO_x emissions from all affected facilities at the site once the collective design capacity of all the affected facilities has reached ten tons.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined for each year of the first five-year period the proposed amendments are in effect, there will be fiscal implications which are not anticipated to be significant for units of state or local government as a result of administration or enforcement of the proposed amendment.

The proposed amendment specifies that the requirement to operate under the emissions cap and trade program in the HGA ozone nonattainment area would apply to facilities or groups of facilities located at a site which have a collective design capacity to emit ten tons or more NO_x per year and which have emission requirements under Chapter 117, the commission's NO_x regulations.

The emissions cap and trade program rules, adopted by the commission in December 2000, are intended to implement and manage a mandatory annual NO_x emission cap, phased in between January 1, 2002 and January 1, 2005, on all existing and new stationary sources located in the HGA ozone nonattainment area consisting of: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

Examples of equipment and processes at sources that would be affected by the proposed amendments include: electric utility boilers and stationary gas turbines; industrial/commercial/institutional (ICI) boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and carbon monoxide (CO) boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and boiler and industrial (BIF) furnace units. The commission would allocate to a facility or group of facilities a number of allowances (NO_x emissions in tons) which a source would be allowed to emit during the calendar year. The facility or group of facilities would not be allowed to exceed this number of allocated allowances unless they obtained additional allowances from another facility's surplus allowances. Facilities with surplus allowances would be allowed to sell those allowances to other facilities operating under the emissions cap. New facilities would have to purchase allowances prior to beginning operations in the HGA ozone nonattainment area. Allowance trading is intended to provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other facility's surplus allowances to meet emission reduction requirements.

Although the exact number is unknown, the commission estimates that approximately 6,000 pieces of equipment would be affected by the proposed amendment and the existing cap and trade rules, some of which are owned and operated by units of state or local governments. This is the same figure that was estimated for the cap and trade rules adopted on December 6, 2000 and includes the facilities that would be affected by this amendment. Affected facilities can purchase or sell allowances for approximately $500 to $5,000 per allowance, depending on market demand and availability. The total cost or revenues gained by units of state and local government sites will depend on the total number of allowances purchased or sold.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined for each of the first five years the proposed amendment to Chapter 101 is in effect, the anticipated public benefit as a result of implementing the amendment would be providing flexibility to those sources covered by Chapter 117 which would facilitate the reduction of emissions of NO_x in the HGA ozone nonattainment area to a level that would allow the area to meet the national ambient air quality standard (NAAQS) for ozone.

The proposed amendment specifies that the requirement to operate under the emissions cap and trade program in the HGA ozone nonattainment area would apply to facilities or groups of

facilities which have a collective design capacity to emit ten tons or more of NO_x per year and which have emission requirements under Chapter 117.

Examples of equipment and processes at sources which would be affected by the proposed amendments include: electric utility boilers and stationary gas turbines; ICI boilers and stationary gas turbines; duct burners used in turbine exhaust ducts; process heaters and furnaces; stationary internal combustion engines; fluid catalytic cracking units (including catalyst regenerators and CO boilers and furnaces); pulping liquor recovery furnaces; lime kilns; lightweight aggregate kilns; heat treating and reheat furnaces; magnesium chloride fluidized bed dryers; incinerators; and BIF units. The commission would allocate to a facility or group of facilities a number of allowances (NO_x emissions in tons) which a source would be allowed to emit during the calendar year. The facility or group of facilities would not be allowed to exceed this number of allowances unless they obtain additional allowances from another facility's surplus allowances. Facilities with surplus allowances would be allowed to sell those allowances to other facilities operating under the emissions cap. New facilities would have to purchase allowances prior to beginning operations in the HGA ozone nonattainment area. Allowance trading is intended to provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other facility's surplus allowances to meet emission reduction requirements.

Although the exact number is unknown, the commission estimates that approximately 6,000 pieces of equipment would be affected by the proposed amendment and the existing cap and trade rules, the majority of which are privately owned and operated. This is the same figure that was estimated for the cap and trade rules adopted on December 6, 2000 and includes the facilities that would be affected by this amendment. Affected facilities can purchase or sell allowances for approximately $500 to $5,000 per allowance, depending on market demand and availability. The total cost or revenues gained by privately owned and operated facilities will depend on the total number of allowances purchased or sold.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be adverse fiscal implications for small or micro-businesses as a result of administration or enforcement of the proposed amendment, because affected owners and operators of new facilities will have to pay for allowances under the emission cap and trade program. Additionally, owners and operators of existing facilities will have their emissions capped. However, allowance trading is intended to provide flexibility and potential cost savings in planning and determining the most economical mix of the application of emission control technology with the purchase of other facility's surplus allowances to meet emission reduction requirements.

Small or micro-businesses located in the HGA ozone nonattainment area can purchase or sell allowances for the same unit price as larger businesses, approximately $500 to $5,000 per allowance. Actual costs for the allowances will be dependent on market demand and availability. The total cost or revenues gained to affected small or micro-businesses will depend on the total number of allowances purchased or sold.

Of the 6,000 identified pieces of equipment at sources in the HGA ozone nonattainment area, some will be owned and operated by small or micro-businesses. Examples of likely equipment at sources operated by small or micro-businesses include boilers, process heaters, and internal combustion engines. There is no feasible way to further reduce the impact of the proposed amendment for small businesses. However, including these businesses in the cap and trade program is expected to provide them flexibility in meeting existing requirements under Chapter 117.

Under Texas Government Code, §2006.002(c), the commission is required to analyze the cost of compliance with the proposed rule amendment on small businesses, as compared to the cost of compliance for the largest businesses affected by the rules. Using the criteria under §2006.002(c)(2), the commission estimated the cost or revenues would range from as low as $5.00 - $50 per employee, assuming 100 employees, to as high as $25 - $250 per employee, assuming 20 employees. The cost or revenue for a large business affect by the proposed amendment would be approximately $.50 - $5.00 per employee, assuming 1,000 employees.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The proposed rulemaking would affect owners and operators of new and existing facilities emitting NO_x subject to §§117.106, 117.206, and 117.475 requirements in the HGA nonattainment area which individually emit less than ten tons per year of NO_x, but which are located at a site with a total of at least ten tons per year of NO_x emission from subject facilities. The commission determined the proposed rulemaking meets the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Existing facilities would be limited to NO_x emission levels under an emissions cap based on historical operating data and specific emission rates determined by Chapter 117. New facilities would be required to identify a source(s) of allowances equal to allowable emissions prior to commencing operation. All facilities subject to this division would be required to hold a quantity of allowances in their compliance account by January 31 following the end of a control period, which is equal to or greater than the total emissions from the preceding control period. The cost of allowances in similar programs nationwide ranges from approximately $500 to $5,000 per allowance (ton), depending on availability and demand. Actual costs in the HGA nonattainment area will be dependent upon market demand and availability. The commission is proposing this amendment as part of a strategy to reduce and permanently cap NO_x emissions to a level which would allow the HGA nonattainment area to attain the ozone NAAQS. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions

of §2001.0225(b), because the proposed amendment does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), §109 as codified in 42 United States Code (42 USC), §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the 42 USC. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that NO_x emission reductions, such as those required by this amendment, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017 as well as under 42 USC, §7410(a)(2)(A).

The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for the proposed amendment. The following is a summary of that assessment. The amendment is proposed as part of a strategy to reduce and permanently cap NO_x emissions to a level which would allow the HGA nonattainment area to attain the ozone NAAQS. Promulgation and enforcement of the rule will not burden private real property. The proposed amendment does not affect private real property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits and allowances that are the subject of this rule are not property rights. Consequently, this amendment does not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the proposed rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the 42 USC, §7410. Specifically, the emission limitations within this proposal were developed in order to meet the ozone NAAQS set by the EPA under the 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the 42 USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rule proposal is to implement a NO_x strategy which is necessary for the HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this proposed amendment is that of an action reasonably taken to fulfill

an obligation mandated by federal law. Therefore, these proposed revisions will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council, and determined that the proposed rule is consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. If adopted, the amended section would require all NO_x sources in the HGA area with emission standards under Chapter 117 which are located at a site and have a collective design capacity to emit ten tons of NO_x or more per year to operate under the requirements of Chapter 101, Subchapter H, Division 3. This requirement is part of the ozone attainment strategy for the HGA area. No new contaminants will be authorized by this amendment, and a reduction of NO_x emissions should occur.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amended section will become part of the state's ozone attainment strategy; therefore, these amendments will be submitted as part of the SIP. As a result, the amended section and any allowances allocated under the section would become applicable requirements under the federal operating permit program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Houston on April 26, 2001 at 2:00 p.m. at the City of Houston Pollution Control Building Auditorium, located at 7411 Park Place Boulevard. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, agency staff members will be available to discuss the proposal 30 minutes prior to the hearing, and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearings, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-015-101-AI. Comments must be received by 5:00 p.m., April 26, 2001. For further information, please contact Matthew R. Baker at (512) 239-1091 or Beecher Cameron at (512) 239-1495.

STATUTORY AUTHORITY

The amendment is proposed under Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The proposed amendment implements TCAA, §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; and 42 USC, §7410(a)(2)(A).

§101.351. Applicability.

This division applies to all stationary facilities which emit nitrogen oxides (NO_x) in the Houston/Galveston nonattainment area which [~~and~~] are subject to the emission specifications under §§117.106, 117.206, and 117.475 of this title (relating to Emission Specifications for Attainment Demonstration; Emission Specifications for Attainment Demonstration; and Emission Specifications) and which are located at a site where they collectively have a design capacity to emit ten tons or more per year of NO_x.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101688
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 239-0348

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CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES
SUBCHAPTER I. NON-ROAD ENGINES
DIVISION 1. AIRPORT GROUND SUPPORT EQUIPMENT

30 TAC §§114.400, 114.402, 114.406, 114.409

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

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §114.400, Definitions; §114.402, Control Requirements; §114.406, Reporting and Recordkeeping Requirements; and §114.409, Affected Counties and Compliance Schedules; and corresponding revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEALS

The rules being proposed for repeal were originally adopted on April 19, 2000 as part of the SIP control strategy for the Dallas/Fort Worth (DFW) ozone nonattainment area to achieve attainment with the national ambient air quality standard (NAAQS) for ozone. When the rules were implemented, they would have resulted in nitrogen oxides (NO_x) emissions reductions through the conversion of airport ground support equipment (GSE) to lower emission equipment. Similar GSE rules were proposed on August 9, 2000, for the Houston/Galveston ozone nonattainment area, but were never adopted because the emission reduction commitments were achieved through federally enforceable agreements among the commission, the major airlines, and the City of Houston.

Recently, the commission developed agreements with Southwest Airlines, American Airlines, Delta Air Lines, the DFW International Airport Board, the City of Dallas, and the City of Fort Worth making federally enforceable certain reductions of local ozone precursor emissions of NO_x from sources at Love Field, DFW International Airport, Alliance Airport, and Meacham Airport.

These agreements will replace the existing rules and result in a similar level of emission reductions. Therefore, the NO_x reductions previously claimed in the DFW Attainment Demonstration SIP will, as a result of this rulemaking, be achieved through an alternate, but equivalent federally enforceable mechanism.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed repeals are in effect there will be no fiscal implications to units of state or local government as a result of implementation of the proposed repeals, which are intended to repeal airport GSE rules for the DFW nonattainment area adopted by the commission in April 2000.

The repealed rules would have required affected airlines at Love Field, DFW International Airport, and Alliance and Meacham Airports to reduce emissions from GSE by 20% by December 31, 2003; 50% by December 31, 2004; and 90% by December 31, 2005. The commission estimated at proposal it would have cost affected owners and operators an estimated $83.5 million to comply with the rule requirements that are being repealed in this rulemaking.

Although there will be compliance costs due to enforceable agreements reached between the commission and affected owners and operators and airports that are intended to achieve similar emission reductions as the April 2000 rules, those costs are not part of this rulemaking. Additionally, because the adopted April 2000 rules did not require emission reductions in GSE until 2003, the commission estimates there have been no significant fiscal impacts to units of state and local government due to the adoption, and subsequent repeal, of the rules.

PUBLIC BENEFIT AND COSTS

Mr. Davis also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from enforcement of and compliance with the proposed repeals will be the continued potential reduction in emissions from affected airports through the implementation and enforcement of agreements between the commission and affected airlines and airports in the DFW nonattainment area.

The repealed rules would have required affected airlines at Love Field, DFW International Airport, and Alliance and Meacham Airports to reduce emissions from GSE by 20% by December 31, 2003; 50% by December 31, 2004; and 90% by December 31, 2005. The commission estimated at proposal it would have cost affected owners and operators an estimated $83.5 million to comply with the rule requirements that are being repealed in this rulemaking.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed changes, which would repeal airport GSE rules for the DFW nonattainment area adopted by the commission in April 2000.

The repealed rules would have required affected airlines at Love Field, DFW International Airport, and Alliance and Meacham Airports to reduce emissions from GSE by 20% by December 31, 2003; 50% by December 31, 2004; and 90% by December 31, 2005. The commission estimated at proposal it would have cost affected owners and operators an estimated $83.5 million to comply with the rule requirements that are being repealed in this rulemaking.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The staff reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rules being proposed for repeal were intended to protect the environment and reduce risks to human health from environmental exposure to ozone and would have affected, in a material way, a sector of the economy, competition, and the environment.

This rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rules proposed for repeal are being replaced by federally enforceable agreements which will result in NO_x emission reductions similar to the NO_x reductions that would have been achieved by the rules. These agreements will protect the environment and reduce risks to human health from environmental exposure to ozone. Therefore there will be no adverse affect of these repeals.

TAKINGS IMPACT ASSESSMENT

Staff prepared a takings impact assessment for this proposed repeal of rules under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rulemaking is to repeal §§114.200, 114.202, 114.206, and 114.209 which will be replaced by federally enforceable agreements which will obtain the similar NO_x reductions necessary for the DFW ozone nonattainment area to meet the NAAQS established under federal law. The repeal of these rules will not burden private real property, which is the subject of the rules, because these rules will be replaced by the agreements and therefore not used by the commission.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

When DFW airport GSE rules were originally adopted, the commission determined that the proposed rulemaking related to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed the previous adoption action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action was consistent with the applicable CMP goals and policies. The CMP goal applicable to the rulemaking action was the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants were authorized and NO_x air emissions were anticipated to be reduced as a result of these rules. The CMP policy applicable to the rulemaking action was the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). The rulemaking action complied with 40 CFR 50, National Primary and Secondary Ambient Air Quality Standards, and 40 CFR 51, Requirements for Preparation, Adoption, and Submittal Of Implementation Plans. Therefore, in compliance with 31 TAC §505.22(e), the rulemaking action was consistent with CMP goals and policies.

The repeal of these rules will not invalidate the determination that the previous rulemaking action was consistent with CMP goals and policies, because the rules proposed for repeal are being replaced by federally enforceable agreements which will result in NO_x emission reductions similar to the NO_x reductions that would have been achieved by the rules. Therefore, this rulemaking action is also consistent with CMP goals and policies.

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal on April 27, 2001 at 11:00 a.m., at the North Central Texas Council of Governments, 2nd Floor Board Room, 616 Six Flags Drive, Suite 200, Arlington. The hearing is structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during each hearing; however, agency staff members will be available to discuss the proposal before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend a hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-013a-114-AI. Comments must be received by 5:00 p.m., April 27, 2001. For further information or questions concerning this proposal, please contact Bill Jordan, Strategic Assessment Division, (512) 239-2583, or Alan Henderson, Policy and Regulations Division, (512) 239-1510.

STATUTORY AUTHORITY

The repeals are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of TWC and other laws of this state. These repeals are also proposed under Texas Health and Safety Code, Texas Clean Air Act (TCAA), §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of TCAA, and §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air.

No other codes, rules, or statutes will be affected by this proposal.

§114.400. Definitions.
§114.402. Control Requirements.
§114.406. Reporting and Recordkeeping Requirements.
§114.409. Affected Counties and Compliance Schedules.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101691
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 239-0348

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 355. RESEARCH AND PLANNING FUND

SUBCHAPTER C. REGIONAL WATER PLANNING GRANTS

31 TAC §§355.91, 355.93, 355.100

The Texas Water Development Board (the board) proposes changes to §§355.91, 355.93, and 355.100 concerning the Regional Water Planning Grants. The proposed changes are based on recommendations received from regional water planning groups, their consultants, board staff, and the public regarding the first round of regional water planning. These

proposed amendments are designed to improve the regional water planning process.

Amendments to §355.91 are to add the Texas Department of Agriculture as a consultant to the board in determining state population and demand projections. This amendment will enhance the reliability and accuracy of the projections, which will ensure a more complete planning process by the regional water planning groups.

Amendments to §355.93 revise the list of activities for which the regional water planning groups can receive funding from the board. The amendments add §355.93(b)(5) to state that a cost/benefit analysis of a water management strategy is not an activity eligible for reimbursement unless the analysis is necessary for a state or federal permit and the executive administrator concurs that the analysis will impact the feasibility of the water management strategy. The purpose of this amendment is to recognize that a cost/benefit analysis may sometimes affect the feasibility of a water management strategy but to still keep the regional water planning process separate from actions related to applying for specific state or federal permits.

The amendments also broaden the scope of eligible activities by including certain administrative costs in §355.93(c). Several regional water planning groups requested that the board fund some or all of the administrative costs incurred in the planning process because the financial burden on the regional entities has been significant. The board agrees that some of these costs should be funded by the state to ensure that the planning process continues without hindrance. Therefore, the board proposes changes to §355.93(c)(1) to fund the costs of travel to and from regional water planning group related meetings for group members who are not eligible to be paid by their employer for the regional water planning group activities. The board discovered in the first round of planning that some regional water planning group members were bearing the cost of travel personally at substantial burden to themselves, which could cause the members to end their membership with the regional water planning group and cause the regional water planning group to lose a member who has been educated in the planning process and has direct knowledge of the planning activities that have occurred. The board proposes changes to §355.93(c)(2) to bear the costs associated with providing translators, determined to be necessary by the regional water planning groups, at regional water planning group activities and meetings. This will ensure public participation by everyone in the region, regardless of communication barriers. The amendments also propose changes to §355.93(c)(3) to fund the direct costs for placing public notices in newspapers for the public hearings required by Chapter 357 of this title. The public hearings are required by Texas Water Code §16.053 and Chapter 357 of this title. These hearings exceed the regular requirements of the Open Meetings Act, and impose a substantial fiscal burden on the regional water planning groups. Funding this expense will ensure regional water planning is able to continue with the appropriate public participation. The board also proposes changes to §355.93(c)(4) to fund the costs of mailing notices to mayors, county judges, special and general law districts, river authorities, and water rights holders. These notification requirements in Texas Water Code §16.053(h) are extensive and go beyond the usual notification requirements of the Open Meetings Act. It is important that these people and entities receive notice of certain planning activities because they have a vested interest or ownership in the water supplies involved. Lastly, the board proposes changes to §355.93(c)(5) to fund the direct costs of providing copies of information to regional water planning group members if that information is relevant to their work on the regional planning group. Copying expenses were high in the first round of planning and the board believes the sharing of information is vital to the education of the regional water planning members and the thoroughness of the planning process. Therefore, funding this activity is appropriate.

The amendments to §355.93(c) also require the regional water planning groups to certify that any expenses incurred are correct and necessary. This safeguards state funds and ensures that the regional water planning groups will keep track of expenses to avoid exceeding contractual limitations.

The amendments to §355.100 provide the regional water planning groups with alternative places they may place copies of their adopted regional water plans. Some of the regional water planning groups had been required to pay a substantial fee to county clerks for posting their initially prepared regional water plans in county clerks' offices. This amendment will provide less costly alternatives but still provide the public with an opportunity to access the regional water plan.

Ms. Pam Gulley, Director of Fiscal Services, has determined that for the first five-year period these sections are in effect there could be fiscal implications on state and local government as a result of enforcement and administration of the sections. The impact to the state cannot be determined exactly, but rough estimates are as follows: The addition of §355.93(b)(5) will have a fiscal impact. Because the number of analyses to be performed under this provision are not known, the board estimates that the fiscal impact will be $56,000 based on the assumption that seven water management strategies will be analyzed at a cost of $8,000 each. This assumption is based on the fact that seven new reservoirs were selected as water management strategies during the first round of regional water planning. The cost of $8,000 per strategy is estimated by estimating the number of hours of work to be 80 hours at an average cost of $100 per hour. It is estimated that the fiscal impact to the state for the amendments to §355.93(c)(1) will be $268,000, assuming that each region has 4 voting members who will qualify for reimbursement to go to 36 meetings with travel being 200 miles round trip and hotel lodging being needed on half of those trips with all expenses reimbursed at state rates. The fiscal impact to the state for the amendments to §355.93(c)(2) cannot be determined. It is estimated that the direct costs for the amendments to §355.93(c)(3) will be $38,400 assuming that each regional water planning group will publish notice in three newspapers for two public hearings. It is estimated that the fiscal impact to the state for amendments to §355.93(c)(4) will be $10,453.64 assuming that there are 750 mayors, 254 county judges, 1,269 special districts, 100 river authorities, 6,700 water systems, and 6,300 water rights holder statewide who will receive notifications twice in 5 years and the cost of first class mail will be $0.34 a stamp in 2001. The fiscal impact to the state for amendments to §355.93(c)(5) cannot be determined. Administrative costs to local government would be correspondingly reduced by same amount as that incurred by the state, which is estimated to be $316,853.64.

Ms. Gulley has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide additional coordination to the regional water planning process, assisting the regional water planning groups with the funding of additional costs associated with the regional water planning process, thereby ensuring the planning process will continue,

and clarification of the existing provisions regarding the regional water planning group's responsibilities. Ms. Gulley has determined there will be no economic costs to small businesses or individuals required to comply with the sections as proposed.

Comments on the proposed rule amendments will be accepted for 30 days following publication and may be submitted to Ms. Phyllis Thomas, @ (512) 463-7926, by e-mail to phyllis@twdb.state.tx.us, or by mail to the attention of Ms. Phyllis Thomas, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231. Before being published as proposed rule amendments, these revisions were released to the public and public comment was received. Any person wishing to submit a comment that will be considered in adopting these proposed rules must submit the comment within the next 30 days. Comments received previously will not be considered during adoption unless resubmitted. The board will hold a public hearing on April 23, 2001 at 1:30 p.m. in Room 118 of the Stephen F. Austin Building, 1700 N. Congress Avenue, Austin, Texas, 78701 to discuss these proposed rules.

The amendments are proposed under the authority granted in Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas, Texas Water Code, §15.403, which authorizes the board to adopt rules to carry out the research and planning program for the proper conservation, management, and development of the state's water resources and regional planning, Texas Water Code §15.4061, which authorizes the board to adopt rules to establish criteria for eligibility for regional water planning money, and Texas Water Code §16.053, which requires the board to develop rules to provide procedures for adoption of regional water plans by regional water planning groups and approval of regional water plans by the board, and to govern procedures to be followed in carry out the responsibilities under §16.053, Water Code.

The statutory provisions affected by the amendments are Texas Water Code, §15.4061 and §16.053.

§355.91. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the applicable provisions of the Texas Water Code, Chapters 15 and 16, and not defined here shall have the meanings provided by such chapters.

(1)-(8) (No change.)

(9) State population and demand projections--Population and water demand projections contained in the state water plan or adopted by the board after consultation with the Texas Natural Resource Conservation Commission, the Texas Department of Agriculture, and the Texas Parks and Wildlife Department in preparation for revision of the state water plan.

(10) (No change.)

§355.93. Eligibility.

(a) Applicants. Eligible applicants may apply for grants to develop an initial scope of work or to develop or revise regional water plans.

(b) Activities. Those activities directly related and necessary to the development or revision of regional water plans are eligible for funding within the limits established in §355.99 of this title (relating to Funding Limitations), with the exception of:

(1) activities for which the board determines existing information or data is sufficient for the planning effort including:

(A) detailed evaluations of cost of water management strategies where recent information for planning is available to evaluate the cost associated with the strategy;

(B) evaluations of groundwater resources for which current information is available from the board or other entity sufficient for evaluation of the resource;

(C) determination of water savings resulting from standard conservation practices for which current information is available from the board;

(D) revision of the state population and demand projections;

(E) revision of state environmental planning criteria for new surface water supply projects; and

(F) collection of data describing groundwater or surface water resources where information for evaluation of the resource is currently available;

(2) activities directly related to the preparation of applications for state or federal permits or other approvals, activities associated with administrative or legal proceedings by regulatory agencies, and preparation of engineering plans and specifications;

(3) activities related to planning for individual system facility needs other than identification of those facilities necessary to transport water from the source of supply to a regional water treatment plant or to a local distribution system; [~~and~~]

(4) costs associated with administration of the plan's development, including but not limited to:

(A) compensation for the time or expenses of regional water planning groups members' service on or for the regional water planning group;

(B) costs of administering the regional water planning groups;

(C) costs of public notice and meetings, including time and expenses for attendance at such meetings;

(D) costs for training;

(E) costs of reviewing products developed due to this grant; and

(F) costs of administering the regional water planning grant and associated contracts; and

(5) analyses of benefits and costs of water management strategies unless the water management strategy must receive a state or federal permit and the executive administrator agrees with the regional water planning group that these analyses would make a material difference in the determination of water management strategy feasibility.

(c) Notwithstanding subsection (b) above, the following administrative costs are eligible for funding in reasonable amount and as limited by contract as long as the regional water planning group either certifies that the expenses are eligible for reimbursement and are correct and necessary during a public meeting or delegates this responsibility to the regional water planning group chairperson, who will certify requests for reimbursement as an administrative function:

(1) travel expenses for regional water planning group voting members who are not eligible for reimbursement from their employer as determined by the executive administrator if the travel expenses are incurred in relation to attendance at posted meetings and other travel authorized by the executive administrator. Expenses will be reimbursed in amounts consistent with the travel regulations set out for state employees in the current General Appropriations Act;

(2) costs associated with providing translators deemed necessary by the regional water planning groups;

(3) direct costs, not including personnel costs, for placing public notices in newspapers for the public hearings required by §357.12(a)(3) and (4) of this title (relating to Notice and Public Participation);

(4) the cost of postage for mailing notices to mayors, county judges, special or general law districts, river authorities, public utilities, and holders of water rights pursuant to §357.12(a)(5) of this title; and

(5) the direct costs, not including personnel costs, of providing copies of information to both voting and non-voting members of the regional water planning group if that information is relevant to their work on the regional planning group.

(d) [~~(c)~~] Bylaws. The board may not approve funds for a regional water planning area until a copy of the adopted bylaws of the regional water planning group that meet the requirements of §357.4(k) of this title (relating to Designation of Regional Water Planning Groups) has been filed with the executive administrator.

(e) [~~(d)~~] Subcontracting. A grant recipient or subcontractor of a grant recipient may obtain professional services, including the services of a planner, land surveyor, licensed engineer, or attorney, for development or revision of a regional water plan only if the grant recipient or subcontractor of a grant recipient has secured such services on the basis of demonstrated competence and qualifications through a request for qualifications process.

§355.100. Availability of Reports and Planning Documents.

All reports, planning documents and any other work products resulting from projects receiving board funding assistance must be made available to the board, the Texas Parks and Wildlife Department, Texas Department of Agriculture, and the Texas Natural Resource Conservation Commission and one copy of the regional water plans placed in [~~the county clerk's office for each county and in~~] at least one public library and either the county courthouse's law library, the county clerk's office, or some other accessible place within the county courthouse of each county having land in the regional water planning 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 March 23, 2001.

TRD-200101750
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: May 16, 2001
For further information, please call: (512) 463-7981

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CHAPTER 357. REGIONAL WATER PLANNING GUIDELINES

31 TAC §§357.2, 357.4 - 357.7, 357.10 - 357.13

The Texas Water Development Board (the board) proposes changes to §§357.2, 357.4 - 357.7, and 357.10 - 357.13 concerning the Regional Water Planning Guidelines. The proposed changes are based on recommendations received from regional water planning groups, their consultants, board staff, and the public regarding the first round of regional water planning. These proposed amendments are designed to improve the regional water planning process.

The proposed amendment to §357.2 adds a definition for wholesale water provider. This assists the regional water planning groups in more accurately identifying suppliers of water for regional needs pursuant to §16.053 of the Texas Water Code. It will also broaden the scope of the planning performed because the board will provide each regional water planning group with a list of the persons and entities that qualify as wholesale water providers. The regional water planning groups will use these lists as the minimum number of wholesale water providers and have the discretion to add to this list. This will not cause a larger number of water providers to be evaluated and planned for than in the current process where the regional water planning groups designate major water providers at their discretion. This change will provide a more complete planning process and recognizes the complex water transactions that occur in Texas where water may be sold several times before reaching the ultimate user. It will also provide uniformity in the designation and analysis of water providers.

Amendments to §357.4 are proposed to require non-voting regional water planning group members to be provided the same notification and materials that voting members are provided. This will enable non-voting members to be more effective on the group and ensure more participation in the planning process. The rest of the changes to this section are renumbering changes to account for this new requirement.

The proposed amendments to §357.5(d) add the Texas Department of Agriculture as an agency that the board will consult when adopting state population and water demand projections. This amendment is to ensure that the board has gathered as much information as possible to provide accurate projections.

The proposed amendments to §357.5(e)(1) and (4) are to clarify the regional water planning groups' responsibility to adjust their water management strategies to provide for environmental needs, to include environmental analyses in the planning process, and to clarify the information about environmental impacts of water management strategies that must be included in the regional water plans. This amendment will help protect natural resources as required by Texas Water Code §16.053(a) and provide environmental information for evaluating water management strategies as required by Water Code §16.053(e)(5)(F).

In addition, the changes to §357.5(e)(4) will also require the regional water planning groups to state and document why cost-effective water management strategies that are environmentally sensitive are not considered and adopted and submit to the public for comment, during a public meeting, the process by which the regional water planning group will identify those water management strategies that are potentially feasible to meet the needs of the region. These changes will provide a better public understanding of the process, thus improving the public's participation, and ensure a better description of

the regional planning groups' analysis process, including their analysis of environmental impacts.

The proposed amendment to §357.5(e)(5) remove unnecessary language to clarify that regional water plans must incorporate water conservation planning and drought contingency planning as required by Texas Water Code §16.053(e).

The proposed amendment to §357.5(e)(7) clarifies that the drought triggers must apply to the sources of water used to supply water users. This change is to clarify an incorrect reference and will provide the regional water planning groups more guidance on the use of drought triggers in their regional water plans.

The proposed deletion of §357.5(m) is to remove a subsection that will no longer apply. This subsection applied to actions of a regional water planning group before the adoption of a regional water plan. The 16 regional water planning groups have now adopted regional water plans.

Amendments to §357.6 are proposed to remove the requirement that regional water planning groups send inquiry letters to all other regional water planning groups about the need to form informational subareas. The amendment changes this to a discretionary function of the regional water planning groups. This will save costs associated with sending out numerous letters inquiring about informational subareas and lets the regions choose when and where the subareas would best be formed. The section does retain, however, the requirement that the information subarea be formed if one regional planning group has asked for it and the conditions of the section are met.

Amendments throughout §357.7 would remove the term major water provider and replace it with wholesale water provider. As noted above, wholesale water provider is a broader term and will enhance the scope of water planning by requiring a more detailed review of projected demands, adequacy of existing supplies, needs and potential solutions for these wholesale water providers.

The proposed amendments to §357.7(a)(1) add the phrase "businesses dependent on natural water resources" to the analysis required of the regional water planning groups of the economic activities in the region. This is to encourage the regional water planning groups to identify and consider those businesses that operate on natural water resources, such as boat rental businesses and guided fishing tours, and provide a more complete analysis of the regions.

Amendments to §357.7(a)(2) through (5) would break the paragraphs into two subparagraphs to clarify that analysis should be by city, utility, and category, as well as wholesale water provider. Counties with more than five utilities that supply more than 280 acre-feet of water per year may be evaluated at the level of wholesale water provider or some other common association, rather than utility. This option for counties with more than five utilities acknowledges that meaningful analysis of water demands and needs can be done at a higher, more cost-effective level in some cases. This will result in regional water plans that are more detailed and comprehensive, thus increasing the quality of the regional water plans.

Amendments to §357.7(a)(3) would require the regional water planning groups to consider the water supply that may be obtained from water savings based on the use of plumbing fixtures that are identified in Chapter 372 of the Texas Health and Safety Code. This change will enhance the use of conservation in the regions and provide a more accurate analysis of water supply, thus improving the quality of the regional water plans and better pursuing the goals of Section 16.053 of the Texas Water Code. The changes would also allow the regional water planning groups to use an operational procedure other than firm yield when analyzing surface water during the drought of record so long as the amount of water available does not exceed the firm yield. This will delegate more authority to the regional water planning groups in determining the best procedure to use to determine water availability and drought response. Amendments to this section also require the regional water planning groups to use the Texas Natural Resource Conservation Commission's water availability model information and the board's groundwater availability model information once it is available unless better site-specific information is available for use. This will provide the regional water planning groups with the most accurate data and enhance the value of the regional water plans. Proposed changes also allow regional water planning groups to assume that water supplies based on contractual agreements will continue past the existing term of the contract if the contract contemplates renewal or extension. This reflects the reality that such contracts are typically renewed or extended.

Amendment to §357.7(a)(5) will require the water management strategies recommended by the regional water plans to meet the water supply obligations necessary to implement recommended water management strategies of wholesale water providers and water users for which drought of record plans are developed under the paragraph. This change will improve the quality and effectiveness of the plans for drought of record to provide a sufficient supply of water.

Amendments to §357.7(a)(6) allow the regional water planning groups to present data in units smaller than those required by §357.7(a)(2) through (5). This allows the regional water planning groups to determine the appropriate reporting unit if they wish to focus on smaller units.

The amendments to §357.7(a)(7) require the regional water planning groups to consider and adopt water conservation strategies unless it is inappropriate and documents its reasons. This change will enhance the consideration of water conservation in regional water plans. Further, several regions recommended this change as a means of more specifically addressing conservation in the regional water plans. The amendments also simplify the evaluation requirements for water management strategies. This will simplify the data that the regional water planning groups need to report in their regional water plans.

The amendments to §357.7(a)(8) require the regional water planning groups to include in their regional water plans a clear discussion of the cost, quantity, and environmental impacts associated with each water management strategy evaluated in terms of present costs and discounted present value costs. The method of analysis must be determined before the analysis begins. The amendments also add the effects on water quality as a factor that must be considered when evaluating water management strategies. These changes will assist the regional water planning groups in evaluating water management strategies and will ensure that all of the required analyses of Texas Water Code §16.053 are included. It more thoroughly defines the environmental analysis that must be done for water management strategies. It will also provide the public with a clear discussion of alternatives and means to make comparisons.

Lastly, the amendments to 357.7(a)(8) also add standards for analysis of interbasin transfers. This will ensure that all regional water plans include the same elements in their analysis and will provide information needed by the Texas Natural Resource Conservation Commission when reviewing interbasin transfers.

The amendments to §357.7(a)(9) remove a redundant term from §357.7(a)(9)(B). This subsection requires the regional water planning groups to make specific recommendations of water management strategies or long-term scenarios to meet long-term needs. It further defines long-term scenario as a combination of various water management strategies. Removing the word "alternatives" from this subsection clarifies the meaning of scenarios and removes confusion of the work to be performed.

The addition of §357.7(a)(11) requires the regional water planning groups to have a separate chapter in the regional water plans to consolidate the water conservation and drought management recommendation of the regional water plans. This will make it much easier for the board and the public to identify the water conservation and drought management strategies of the regional water plans, which will facilitate the board and the public making effective, timely comments on initially prepared plans. This will also enhance the public participation, which is a cornerstone of the Section 16.053 of the Texas Water Code.

The amendments to §357.10 clarify that the regional water planning groups must submit their initially prepared regional water plans, adopted regional water plans, and data in the format required by this chapter and the executive administrator. This ensures consistency of the plans and data submitted and ensures that the requirements of §16.053 of the Texas Water Code and this chapter are met. The amendments require the regional water planning groups to include, in their regional water plans, a summary of the comments received from the public, the board, other Texas state agencies, and federal agencies. The amendments also clarify that the regional water planning groups are required to explain how the regional water plan was changed based on the comments received or state why a change was unnecessary. These amendments ensure meaningful public participation in the planning process, a cornerstone of Texas Water Code §16.053, by making sure they have the ability to address the initially prepared regional water plans and that their comments will be considered by the regional water planning groups. It also results in regional water plans that have considered comments from all sources.

Amendments to §357.11 would change some of the requirements for submitting initially prepared regional water plans and clarify that the regional water planning groups submit their initially prepared regional water plans to the public at the same time they are submitted to the board. The changes require the regional water planning groups to certify that the initially prepared plan is complete and that it has been adopted by the group. This will help ensure that the requirements of Texas Water Code §16.053 and chapters 355, 357, and 358 of this title are met. The changes will improve the efficiency of plan adoption process, allow the regional water planning groups to start collecting comments on the initially prepared plan from all sources at the same time, and assures the public that it is receiving an initially prepared plan that is thoroughly considered.

The amendments to §357.11 would also extend the time the board has to provide comments on the initially prepared plans from 30 to 120 days. The changes establish that the time period state and federal agencies have to submit comments is also 120 days. This will provide the board and other governmental agencies with sufficient time to study the initially prepared plans and make appropriate and comprehensive comments. Each of these entities is reviewing plans from all regions and should be given a longer time to review the plans. Also, the short time deadlines of the initial regional water planning cycle are not a factor in the future cycles.

The amendments to §357.12 would clarify that the regional water planning groups must adopt an initially prepared plan before the public hearing. This change is similar to the one in §357.11 and assures the public that it is receiving and commenting on a thoroughly considered initially prepared plan. It provides the public with an initially prepared plan that is one step away from becoming the adopted plan of the regional water planning group. Therefore, comments made by the public and others would be directly considered for potential revision and adoption in the regional water plan.

The amendments to §357.12(b) provide the regional water planning groups with alternative places they may place copies of their initially prepared regional water plan in compliance with §16.053(h)(3) of the Texas Water Code. That section requires placement of the initially prepared plan in each county courthouse in the region. Existing rules require the initially prepared plan to be placed in the county clerk's office. Some of the regional water planning groups had been required to pay a substantial fee to county clerks for posting their initially prepared regional water plans in county clerks' offices. This amendment will provide less costly alternatives that fit the requirements of the state law.

The amendments to §357.12(d) require the regional water planning groups to publish their agenda, meeting notices, initially prepared regional water plans, and adopted regional water plans on the Internet. The amendments provide that the regional water planning groups can satisfy this requirement by submitting their material to the board for publishing on the board's web site. This will provide the public with an easy way to access regional water planning material and enhance public participation.

Lastly, the amendments to §357.13 would clarify that projects brought to the board for funding must be consistent with the approved regional water plans, as required by §16.053(j) of the Texas Water Code. The changes describe how the board will determine if a project is consistent with an approved regional water plan.

Ms. Pam Gulley, Director of Fiscal Services, has determined that for the first five-year period these sections are in effect there could be fiscal implications on state and local government as a result of enforcement and administration of the sections during the five-year planning cycle. The impact to the state cannot be determined exactly as funds have not been appropriated by the legislature for the entire five-year planning cycle, but rough estimates are as follows.

It is estimated that the amendments to §357.7(a) related to replacing the term "major water provider" with "wholesale water provider" will have no net fiscal impact because the number of wholesale water providers expected to be identified in the second round of planning is anticipated to be approximately the same as the number of major water providers identified during the first round of planning. This expectation is based on TWDB records from 1998 that identify entities that would qualify as wholesale water providers under the new definition in the amendments to §357.2 of this title. It is also estimated that the fiscal impact

of changes in §357.7(a)(2)-(5) will be approximately $1 million. This is based on the assumption that requiring the regional water plans to include utilities that provide more than 280 acre-feet per year will increase the identification of utilities that have needs for additional water supply using the costs from the first round of planning as a comparator.

It is estimated that the amendments to §357.6 will save local governmental entities approximately $6,500. This estimate is based on the assumption that the regional water planning groups will only send inquiries about forming informational subareas to three, instead of 15, other regional water planning groups and will only be expected to respond to the inquiries from three other regions. The change in §357.12(b) related to placement of adopted plans in county clerk offices could save local government approximately $12,000, assuming that 10 of the 254 county clerks charged a $2 per page filing fee on plans containing 500 pages during the first round of planning. Therefore, these proposed amendments have a net savings of $18,500 to local government.

Ms. Gulley has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide additional details in the regional water planning process resulting in increased reliability of the water supplies in Texas and increased effectiveness of public participation in the planning process. Ms. Gulley has determined there will be no economic costs to small businesses or individuals required to comply with the sections as proposed.

Comments on the proposed rule amendments will be accepted for 30 days following publication and may be submitted to Ms. Phyllis Thomas, @ (512) 463-7926, by e-mail to phyllis@twdb.state.tx.us, or by mail to the attention of Ms. Phyllis Thomas, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231. Before being published as proposed rule amendments, these revisions were released to the public and public comment was received. Any person wishing to submit a comment that will be considered in adopting these proposed rules must submit the comment within the next 30 days. Comments received previously will not be considered during adoption unless resubmitted. The Board will hold a public hearing on April 23, 2001 at 1:30 p.m. in Room 118 of the Stephen F. Austin Building, 1700 N. Congress Avenue, Austin, Texas, 78701 to discuss these proposed rules.

The amendments are proposed under the authority granted in Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas, and under the authority of Texas Water Code, §16.053, which requires the board to develop rules to provide procedures for adoption of regional water plans by regional water planning groups and approval of regional water plans by the board, and to govern procedures to be followed in carry out the responsibilities under §16.053, Water Code.

The statutory provision affected by the amendments is Texas Water Code, §16.053.

§357.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the applicable provisions of the Texas Water Code, Chapter 16, and not defined here shall have the meanings provided in Chapter 16.

(1)-(8) (No change.)

(9) Wholesale water provider -- any person or entity, including river authorities and irrigation districts, that has contracts to sell more than 1000 acre-feet of water wholesale in any one year during the five years immediately preceding the adoption of the last regional water plan. At their discretion, the regional water planning groups may include as wholesale water providers other persons and entities that enter or that the regional water planning group expects or recommends to enter contracts to sell more than 1000 acre-feet of water wholesale during the planning cycle.

§357.4. Designation of Regional Water Planning Groups.

(a)-(h) (No change.)

(i) Non-voting members of the regional water planning group shall receive meeting notifications and information in the same manner as voting members.

(j) [~~(i)~~] Regional water planning groups may form voluntary associations composed of representatives of one or more regional water planning areas. These interregional planning committees may coordinate interregional issues that will benefit each regional water planning area, and may conduct joint studies of issues affecting their regions. Regional water planning groups may enter into written agreements with one or more other regional water planning groups that are binding to the extent allowed by law. These agreements could, in addition to other purposes, allow two or more regional water planning groups to jointly prepare one plan for all or a portion of their regional water planning areas subject to approval of all regional water planning groups involved.

(k) [~~(j)~~] Regional water planning groups may form subregional water planning groups to conduct planning that may be incorporated into the regional water plans such as for metropolitan and non-metropolitan areas, to study technical or other issues, or other reasons determined by the regional water planning groups. The regional water planning group shall assure that all of the interests listed in subsection (a) of this section are invited to participate on each of the subregional water planning groups[~~group~~] formed. Regional water planning groups may form committees to address issues deemed appropriate by the regional water planning group. Any plans or information developed by subregional water planning groups or by committees may be included in the regional water plan only upon approval of the regional water planning group.

(l) [~~(k)~~] Regional water planning groups shall adopt, by a vote of two-thirds of the members of the regional water planning group, bylaws that are consistent with provisions of this chapter. The regional water planning group shall provide copies of its bylaws and any revisions thereto to the executive administrator. Within 30 days after the board names members of the initial coordinating body, the executive administrator shall provide to each member of the initial coordinating body a set of model bylaws which the regional water planning group may consider. The bylaws adopted by the regional water planning group shall at a minimum address the following elements:

(1) definition of a quorum necessary to conduct business;

(2) method to be used to approve items of business including adoption of regional water plans or amendments thereto;

(3) methods to be used to name additional members;

(4) terms and conditions of membership;

(5) methods to record minutes and where minutes will be archived as part of the public record; and

(6) methods to resolve disputes between regional water planning group members on matters coming before the regional water planning group.

(m) [~~(l)~~] The board may not approve funding under Chapter 355, Subchapter C of this title (relating to Regional Water Planning Grants) for a regional water planning area until a copy of the adopted bylaws of the regional water planning group that meet the requirements of subsection (l)[~~(k)~~] of this section has been filed with the executive administrator.

§357.5. Guidelines for Development of Regional Water Plans.

(a)-(c) (No change.)

(d) Use of population and water demands. In developing regional water plans, regional water planning groups shall use:

(1) state population and water demand projections contained in the state water plan or adopted by the board after consultation with the Texas Natural Resource Conservation Commission, Texas Department of Agriculture, and Texas Parks and Wildlife Department in preparation for revision of the state water plan; or

(2) in lieu of paragraph (1) of this subsection, population or water demand projection revisions that have been adopted by the board, after coordination with Texas Natural Resource Conservation Commission, Texas Department of Agriculture, and Texas Parks and Wildlife Department, based on changed conditions and availability of new information. Within 45 days of receipt of a request from a regional water planning group for revision of population or water demand projections, the executive administrator shall consult with the requesting regional water planning group and respond to their request.

(e) Plan development. In developing regional water plans, regional water planning groups shall:

(1) ensure that water management strategies are adjusted to provide for appropriate [~~evaluate alternative water management strategies for effect on~~] environmental water needs, including [~~effect on~~] instream flows and bays and estuaries inflows, on water management strategies. Evaluation shall use [~~using~~] environmental information resulting from existing site-specific studies, or, in the absence of such information, shall use[~~using~~] state environmental planning criteria adopted by the board for inclusion in the state water plan after coordinating with staff of Texas Natural Resource Conservation Commission and Texas Parks and Wildlife Department;

(2) provide water management strategies to be used during a drought of record;

(3) protect existing water rights, water contracts, and option agreements, but may consider potential amendments of water rights, contracts and agreements. Any amendments will require the eventual consent of the owner;

(4) provide specific recommendations of water management strategies based upon identification, analysis, and comparison of all water management strategies the regional water planning group determines to be potentially feasible so that the cost effective water management strategies which are environmentally sensitive are considered and adopted unless the regional water planning group demonstrates that adoption of such strategies is not appropriate. Before a regional water planning group begins the process of identifying potentially feasible water management strategies, it shall document the process by which it will list all possible water management strategies and identify the water management strategies that are potentially feasible for meeting a need in the region. Once this process is identified, the regional water planning group shall present it to the public for comment at the public meeting required by §357.12(a)(1) of this title (relating to Notice and Public Participation) [~~pursued, where appropriate~~];

(5) incorporate water conservation planning and drought contingency planning [~~into the near-term strategies and long-term strategies or alternatives to address water supply needs~~];

(6) conduct their planning to achieve efficient use of existing water supplies, explore opportunities for and the benefits of developing regional water supply facilities or providing regional management of water facilities, coordinate the actions of local and regional water resource management agencies, provide substantial involvement by the public in the decision-making process, and provide full dissemination of planning results;

(7) for each source of water supply in the regional water planning area designated in accordance with §357.7(a)(3) [~~§357.7(a)(1)~~] of this title (relating to Regional Water Plan Development), identify:

(A) factors specific to each source of water supply to be considered in determining whether to initiate a drought response, and

(B) actions to be taken as part of the response; and

(8) consider the effect of the regional water plan on navigation.

(f)-(l) (No change.)

[~~(m) Actions needed for regional water plan adoption and approval. Prior to adoption and approval of a regional water plan, nothing in this chapter shall prevent development of a management plan or project where local or regional needs require action.~~]

§357.6. Preplanning.

Prior to the preparation of the regional water plans the regional water planning group shall perform the following tasks:

(1) (No change.)

(2) determine terms of participation as used in §357.7(a)(5)(C)(ii)[~~§357.7(a)(5)(B)~~] of this title (relating to Regional Water Plan Development);

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

(6) a regional water planning group may ask any other regional water planning group to designate [~~ask regional water planning groups (responding regional water planning groups) of all other regional water planning areas (responding regional water planning areas) if they desire to have~~] a geographical region [~~designated~~] as an informational subarea so that water planning information may be readily exchanged for such informational subareas. Forming[~~For~~] informational subareas facilitates the[~~that meet one or more of the requirements of subparagraphs (A)-(E) of this paragraph, regional water planning groups and responding regional water planning groups shall~~] exchange of information specified in §357.7(a)(2)-(4) of this title (relating to Regional Water Plan Development) on population and water demand data, on water supplies available, on water supply and demand analysis results, and available information on environmental water needs, in addition to any other information the regional water planning groups choose to exchange. If a regional water planning group is asked to form an informational subarea, the regional water planning group must agree [~~The regional water planning group shall develop its scope of work so that information can be exchanged with the responding regional water planning group~~] if the geographic region comprising the informational subarea meets one or more of the following criteria:

(A) is currently being provided wholesale or retail water service by an entity whose headquarters is in the responding regional

water planning area or from sources of water or facilities within the responding regional water planning area;

(B) is within an area designated by the Texas Legislature as an area, either in whole or in part, that may or shall be served by an entity whose headquarters is in the responding regional water planning area or from sources of water or facilities in the responding regional water planning area;

(C) is an area identified in current or existing studies as an area likely to be served in the future from entities whose headquarters are in the responding regional water planning area or from sources of water or facilities within the responding regional water planning area;

(D) is an area where environmental water needs are impacted or are potentially impacted by water management strategies that might be considered by the regional water planning group; or

(E) is designated by the executive administrator as an informational subarea.

§357.7. Regional Water Plan Development.

(a) Regional water plan development shall include the following:

(1) description of the regional water planning area including wholesale[~~major~~] water providers, current water use, identified water quality problems, sources of groundwater and surface water including major springs, major demand centers, agricultural and natural resources, social and economic aspects of the regional water planning area including information on current population and primary economic activities including businesses dependent on natural water resources, initial assessment of current preparations for drought within the regional water planning area, summary of existing regional water plans, summary of recommendations in state water plan, summary of local water plans, and any identified threats to the agricultural and natural resources of the regional water planning area due to water quantity problems or water quality problems related to water supply;

(2) presentation of current and projected population and water demands. Results shall be reported:

(A) by

(i) city for cities with populations greater than 500 people,

(ii) utility for counties that have less than five utilities which provide more than 280 acre-feet per year,

(iii) individual utility or collective data for all such utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five utilities which provide more than 280 acre-feet per year. The regional water planning group shall designate in its contract entered pursuant to §355.98 of this title (relating to Contracts) which counties will be reported by individual utilities and which counties will be reported by the wholesale water provider or other reporting unit [~~by city, major providers of municipal and manufacturing water~~], and

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;

(B) for each wholesale water provider by category of water use (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin. The wholesale water provider's current contractual obligations to supply water must be reported in addition to any demands projected for the wholesale water provider;

(3) evaluation of adequacy of current water supplies available to the regional water planning area for use during drought of record. This evaluation shall consider surface water and groundwater data from the state water plan, existing water rights, contracts and option agreements, other planning and water supply studies, and analysis of water supplies currently available to the regional water planning area including those supplies that can be obtained from water savings by using plumbing fixtures identified in Chapter 372 of the Texas Health and Safety Code. The regional water planning group shall determine the extent to which such plumbing fixtures impact projected water use in the region. Firm yields for reservoirs shall be presented. Analysis of surface water available during drought of record may be based on operational procedures other than firm yield from reservoirs upon the documented decision of the regional water planning group as long as the amount of water available due to the operational procedure does not exceed the amount of water that would be available using firm yield unless permits provide higher values[~~from reservoirs shall be based on firm yield analysis of reservoirs~~]. Firm yield is defined as the supply the reservoir can provide during a drought of record using reasonable sedimentation rates and the assumption that all senior water rights will be totally utilized. Until information is provided by the Texas Natural Resource Conservation Commission, regional water planning groups may use estimates of the projected amount of surface water that would be available from existing water rights during a drought of record. Once this information is available from the Texas Natural Resource Conservation Commission, the regional water planning group shall incorporate it in its next planning cycle unless better site-specific information is available. Until information is available from the board regarding groundwater availability from modeling, the regional water planning groups may use estimates of the projected amounts as long as they describe the method used to arrive at those estimates. Once the groundwater availability modeling information is available for an area within a region, that regional water planning group shall incorporate such information in its next planning cycle unless better site-specific information is available.. The executive administrator, after coordination with staff of the Texas Natural Resource Conservation Commission and the Texas Parks and Wildlife Department, shall identify the methodology, in consultation with representatives of regional water planning groups, to be used by regional water planning groups to calculate water availability during drought of record. The executive administrator shall provide available technical assistance to the regional water planning groups upon request to assist them in selecting appropriate methods and data to be used to determine water supply availability. Water supplies based on contracted agreements shall be based on the terms of the contract, which may be assumed to renew at the contract termination date if the contract contemplates renewal or extensions. Results of evaluations shall be reported:

(A) by

(i) city for cities with populations greater than 500 people,

(ii) utility for counties that have less than five utilities which provide more than 280 acre-feet per year,

(iii) individual utility or collective data for all such utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five utilities which provide more than 280 acre-feet per year. The regional water planning group shall designate in its contract entered pursuant to §355.98 of this title (relating to Contracts) which counties will be reported by individual utilities and which counties will be reported by the wholesale water provider or other reporting unit[~~by city, major providers of municipal and manufacturing water~~], and

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;

(B) for each wholesale water provider by category of water use (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin. The wholesale water provider's current contractual obligations to supply water must be reported in addition to any demands projected for the wholesale water provider;

(4) water supply and demand analysis comparing:

(A) water demands as developed in paragraph (2)(A) [~~(2)~~] of this subsection with current water supplies available to the regional water planning area as developed in paragraph (3)(A) [~~(3)~~] of this subsection to determine if the water users identified in paragraph (2)(A) of this subsection in the regional water planning area will experience a surplus of supply or a need for additional supplies. The social and economic impact of not meeting these needs shall be evaluated by the regional water planning groups and reported by regional water planning area and river basin. The executive administrator shall provide available technical assistance to the regional water planning groups, upon request, on water supply and demand analysis, including methods to evaluate the social and economic impacts of not meeting needs. Other results shall be reported by

(i) city for cities with populations greater than 500 people,

(ii) utility for counties that have less than five utilities which provide more than 280 acre-feet per year,

(iii) individual utility or collective data for all such utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five utilities which provide more than 280 acre-feet per year. The regional water planning group shall designate in its contract entered pursuant to §355.98 of this title (relating to Contracts) which counties will be reported by individual utilities and which counties will be reported by the wholesale water provider or other reporting unit[~~city, major providers of municipal and manufacturing water~~], and

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin; [~~The executive administrator shall provide available technical assistance to the regional water planning groups, upon request, on water supply and demand analysis, including methods to evaluate the social and economic impacts of not meeting needs;~~]

(B) water demands as developed in paragraph (2)(B) of this subsection with current water supplies available to the wholesale water provider as developed in paragraph (3) of this subsection to determine if the wholesale water providers in the regional water planning area will experience a surplus of supply or a need for additional supplies. Results shall be reported for each wholesale water provider by categories of water use (including municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin. The executive administrator shall provide available technical assistance to the regional water planning groups, upon request, on water supply and demand analysis;

(5) using the water supply needs identified in paragraph (4) of this subsection, plans to be used during the drought of record to provide sufficient water supply to meet the needs identified in paragraph (4) of this subsection and in accordance with water management strategies and scenarios described in paragraph (9)[~~(8)~~] of this subsection as follows:[~~.~~]

(A) Water management strategies shall be developed for:

(i) city for cities with populations greater than 500 people,

(ii) utility for counties that have less than five utilities which provide more than 280 acre-feet per year,

(iii) individual utility or collective data for all such utilities that form a logical reporting unit, such as being served by a common wholesale water provider or having a common source or other association appropriate for the area, in the judgment of the regional water planning group, for counties with more than five utilities which provide more than 280 acre-feet per year. The regional water planning group shall designate in its contract entered pursuant to §355.98 of this title (relating to Contracts) which counties will be reported by individual utilities and which counties will be reported by the wholesale water provider or other reporting unit, and [~~cities, major providers of municipal and manufacturing water, and for~~]

(iv) categories of water use (including municipal not otherwise reported, manufacturing, irrigation, steam electric power generation, mining, and livestock watering) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;[~~.~~]

(B) water management strategies shall be developed for wholesale water providers. The water management strategies shall also meet the new water supply obligations necessary to implement recommended water management strategies of other wholesale water providers and water users for which plans are developed under of this paragraph. Results shall be reported for each wholesale water provider by category of water use (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock) for each county or portion of a county in the regional water planning area. If a county or portion of a county is in more than one river basin, data shall be reported for each river basin;

(C) The plan to be used for water supply during drought of record shall meet all needs for the water use categories of municipal,

manufacturing, irrigation, steam electric power generation, mining, and livestock watering except:

(i) [~~(A)~~] plans may identify those needs for which no water management strategy is feasible. Full evaluation of water management strategies must be presented and reasons given for why no water management strategies are feasible; or

(ii) [~~(B)~~] where a political subdivision that provides water supply (other than water supply corporations, counties, or river authorities) does not participate in the regional water planning effort for needs located within its boundaries or extraterritorial jurisdiction. The regional water planning group shall establish terms of participation that shall be equitable and shall not unduly hinder participation;

(6) presentations of the data required in paragraphs (2) through (5) of this subsection in subdivisions of the reporting units required such as reporting irrigation for a county by splitting it into two or more reporting units, if the regional planning group desires;

(7) [~~(6)~~] evaluation of all water management strategies the regional water planning group determines to be potentially feasible, including:

(A) water conservation strategies and drought response planning including water demand management. The executive administrator shall provide technical assistance to the regional water planning groups on water conservation strategies. The regional water planning group must consider water conservation strategies for each need identified in paragraph (4) of this subsection. If the regional water planning group does not adopt a water conservation and drought response strategy for a need, it must document the reason;

(B) reuse of wastewater;

(C) expanded use [~~or acquisition~~] of existing supplies including systems optimization and conjunctive use of resources,[~~;~~]

[~~(D)~~] reallocation of reservoir storage to new uses,[~~;~~]

[~~(E)~~] voluntary redistribution of water resources including contracts, water marketing, regional water banks, sales, leases, options, subordination agreements, and financing agreements,[~~;~~]

[~~(F)~~] subordination of existing water rights through voluntary agreements,[~~;~~]

[~~(G)~~] enhancements of yields of existing sources,[~~;~~]

[~~(H)~~] and improvement of water quality including control of naturally occurring chlorides;

[~~(I) interbasin transfers;~~]

(D) [~~(J)~~] new supply development including construction and improvement of surface water and groundwater resources,[~~;~~]

[~~(K) water management strategies identified in the state water plan for the regional water planning area; ~~]

[~~(L)~~] brush control, precipitation enhancement, [~~and~~] desalination,[~~;~~]

[~~(M)~~] water supply that could be made available by cancellation of water rights based on data provided by the Texas Natural Resource Conservation Commission;

(E) interbasin transfers; and

[~~(N) aquifer storage and recovery; and ~~]

(F) [~~(O)~~] other measures;

(8) [~~(7)~~] evaluations of water management strategies by including:

(A) a quantitative reporting of:

(i) [~~evaluation of~~] the quantity, reliability, and cost of water delivered and treated for the end user's requirements, incorporating factors to be used in the calculation of infrastructure debt payments, present costs, and discounted present value costs provided by the executive administrator;

(ii) [~~(B)~~] environmental factors including effects on water quality, environmental water needs, wildlife habitat, stream segments that meet one or more of the criteria in §357.8(b) of this title (relating to Ecologically Unique River and Stream Segments), cultural resources, and effect of upstream development on bays, estuaries, and arms of the Gulf of Mexico;

(B) [~~(C)~~] impacts on other water resources of the state including other water management strategies and groundwater surface water interrelationships;

(C) [~~(D)~~] impacts of water management strategies on threats to agricultural and natural resources of the regional water planning area;

(D) [~~(E)~~] any other factors as deemed relevant by the regional water planning group including recreational impacts;

(E) [~~(F)~~] equitable comparison and consistent application of all water management strategies the regional water planning groups determines to be potentially feasible for each water supply need;

(F) [~~(G)~~] consideration of the provisions in Texas Water Code, §11.085(k)(1) for interbasin transfers. At a minimum, this consideration shall include a summation of water needs in the basin of origin and in the receiving basin, based on needs presented in the applicable approved regional water plan; and

(G) [~~(H)~~] consideration of third party social and economic impacts resulting from voluntary redistributions of water;

(9) [~~(8)~~] plans to meet needs, which shall include:

(A) specific recommendations of water management strategies to meet the near-term needs in sufficient detail to allow state agencies to make financial or regulatory decisions to determine the consistency of the proposed action before the state agency with an approved regional water plan; and

(B) specific recommendations of water management strategies or [~~alternative~~] long-term scenarios that meet the long-term needs. A [~~An alternative~~] long-term scenario is a combination of various water management strategies; [~~and~~]

(10) [~~(9)~~] regulatory, administrative, or legislative recommendations that the regional water planning group believes are needed and desirable to: facilitate the orderly development, management, and conservation of water resources and preparation for and response to drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; further economic development; and protect the agricultural and natural resources of the state and regional water planning area. The regional water planning group may develop information as to the potential impact once proposed changes in law are enacted; and

(11) a chapter consolidating the water conservation and drought management recommendations of the regional water plan.

(b)-(c) (No change.)

§357.10. Format of Information to be Presented in Regional Water Plans.

(a) Initially prepared and adopted regional water plans or amendments to approved regional water plans shall include the following:

(1) technical report and data prepared in accordance with this chapter and the executive administrator's specifications; [~~and~~]

(2) executive summary that documents the key regional water plan findings and recommendations; and [~~.~~]

(3) [~~(b) In addition to the requirements in subsection (a) of this section, adopted regional water plans and amendments adopted thereto shall include~~]summaries of all written and oral comments received pursuant to §357.11(b) of this title (relating to Adoption of Regional Water Plans by Regional Water Planning Groups)[~~at the public hearing required by §357.12(a)(3) and (4) of this title, and all written comments received within the timeframe specified by the regional water planning group under §357.12(a)(6)(D) of this title~~], with a response by the regional water planning group explaining how the plan was revised or why changes were not warranted in response to written comments received under §357.11(b) of this title.

(b) [~~(c)~~] The regional water planning group will transfer copies of all data and reports generated by the planning process and used in developing the regional water plan to the executive administrator. To the maximum extent possible, data shall be transferred in digital form according to specifications provided by the executive administrator. One copy of all reports prepared by the regional water planning group shall be provided in digital format according to specifications provided by the executive administrator. All digital mapping shall use a geographic information system according to specifications provided by the executive administrator. The executive administrator shall seek the input from the Texas Geographic Information Council regarding specifications mentioned in this subsection.

§357.11. Adoption of Regional Water Plans by Regional Water Planning Groups.

(a) Regional water planning groups shall concurrently submit to the executive administrator and release to the public an initially prepared regional water plan prior to adoption of the regional water plan. The initially prepared plan submitted to the executive administrator must be in the electronic and paper format specified by the executive administrator. The regional water planning groups must certify that the initially prepared regional water plan is complete and adopted by the regional water planning group.

~~[(a) Regional water planning groups shall submit an initially prepared regional water plan to the executive administrator prior to adoption of the regional water plan by the regional water planning group. The executive administrator shall provide written comments to the regional water planning group within 30 days of receipt of the initially prepared regional water plan. The executive administrator may delay providing comments up to a total of 60 days from receipt of the initially prepared regional water plan by providing reasons for the delay to the regional water planning group. The regional water planning group shall consider revisions to the regional water plan based on the executive administrator's written comments and all other public comments received.]~~

(b) The regional water planning groups shall receive and consider the following comments when adopting a regional water plan:

(1) the executive administrator's written comments, which shall be provided to the regional water planning group within 120 days of receipt of the initially prepared plan;

(2) written comments received from any federal agency or Texas state agency, which the regional water planning groups shall accept for at least 120 days after the first public hearing notice is published pursuant to §357.12(a)(3) and (5) of this title (relating to Notice and Public Participation); and

(3) any written or oral comments received from the public after the first public hearing notice is published pursuant to §357.12(a)(3) and (5) of this title until at least 30 days after the public hearing is held pursuant to §357.12(a)(3) and (4) of this title.

(c) [~~(b)~~] The regional water planning group shall submit in a timely manner to the executive administrator information on any known interregional conflict between regional water plans.

(d) [~~(c)~~] The regional water planning group shall modify the regional water plan to incorporate board resolutions of interregional conflicts.

(e) [~~(d)~~] The regional water planning group shall seek to resolve conflicts with other regional water planning groups and shall participate in any board sponsored efforts to resolve interregional conflicts.

(f) [~~(e)~~] A regional water planning group may amend an adopted regional water plan at any meeting, after giving notice according to §357.12 of this title. A political subdivision in the regional water planning area may request a regional water planning group to consider specific changes to an adopted regional water plan. A regional water planning group must formally consider such request within 180 days after its submittal and shall amend its adopted regional water plan if it determines an amendment is warranted. A regional water planning group may propose amendments to an approved regional water plan by submitting proposed amendments to the board for its consideration and possible approval under the standards and procedures of this chapter.

§357.12. Notice and Public Participation.

(a) Regional water planning groups and any subregional water planning groups shall provide for public participation which shall include the following:

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

(3) a public hearing following adoption[~~preparation but before submittal to the board,~~] of an initially prepared regional water plan, to be held in a central location within the regional water planning area;

(4)-(5) (No change.)

(6) notice of the public meetings and public hearings shall include:

(A)-(C) (No change.)

(D) information that the regional water planning group will accept written and oral comments at the hearings required by paragraphs (3) and (4) of this subsection, and information on how the public may submit written comments separate from such hearings. The regional water planning group shall specify a deadline for submission of public written comments of not earlier than 30 days after the hearings required by paragraphs (3) and (4) of this subsection.

(b) Regional water planning groups shall make copies of the regional water plan available for public inspection at least one month before a public hearing required or held in accordance with subsection (a)(3) and (4) of this section by providing a copy of the regional water plan in [~~the county clerk's office and~~]at least one public library and either the county courthouse's law library, the county clerk's office, or some other accessible place within the county courthouse of each county having land in the regional water planning area and include locations of such copies in the notice for public hearing.

(c) (No change.)

(d) Regional water planning groups shall publish agendas, meeting notices, and current adopted initially prepared plans and adopted final regional water plans on the Internet. This requirement can be met by submitting the information, in the format specified by the executive administrator, to the board to be posted on the board's web site.

§357.13. Consistency with Regional Water Plan.

(a) For the purposes of the Texas Water Code, §16.053(j), projects proposed to the board for funding will be considered to meet any need identified in an approved regional water plan in a manner consistent with the regional water plan if the project:

(1) is an enhancement of a current water supply identified in the analysis developed under §357.7(a)(3) and (4) of this title (relating to Regional Water Plan Development) as meeting a demand, even though the project is not specifically recommended in the regional water plan; or

(2) is meeting a need in a manner consistent with the plan developed under §357.7(a)(5) of this title.

(b) [~~(a)~~] For the purposes of the Texas Water Code, §16.053(j), projects proposed to the board for funding to meet any need identified in an approved regional water plan for which there is not a recommended water management strategy in such plan will be considered by the board not to be consistent with the approved regional water plan.

(c) [~~(b)~~] For purposes of the Texas Water Code, §16.053(k), the board may consider, among other factors, changed conditions if a political subdivision requests a waiver of the Texas Water Code, §16.053(j) for a project proposed to the board for funding to meet a need in a manner that is not consistent with the manner the need is addressed in an approved regional water plan. The board shall request the members of any affected regional water planning group to provide input on the request for waiver of the Texas Water Code, §16.053(j).

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101752
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: June 20, 2001
For further information, please call: (512) 463-7981

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 87. TREATMENT

SUBCHAPTER A. PROGRAM PLANNING

37 TAC §87.7

The Texas Youth Commission (TYC) proposes an amendment §87.7 concerning Furloughs. The amendment to the section corrects the number reference of a related rule and makes minor punctuation corrections.

Don McCullough, Acting Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be defining the conditions under which a youth would be allowed to leave a residential facility. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to Sherma Cragg, Chief of Policy and Manuals, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The amendment is proposed under the Human Resources Code, §61.0761, which provides the Texas Youth Commission with the authority to develop programs that could encourage family involvement.

The proposed rule affects the Human Resource Code, §61.034.

§87.7. Furloughs.

(a) Purpose. The purpose of this rule is to establish the conditions under which a youth may be furloughed while in any residential placement assigned by the agency.

(b) Explanation of Terms Used. Furlough - an authorized absence from an assigned residential program for a specific purpose and for a limited period of time.

(c) Youth in residential programs may be granted furloughs. Furlough Types.

(1) Emergency. An emergency furlough may be granted when an emergency situation exists in the youth's family, which under normal circumstances, would require his/ her presence as a family member.

(2) Administrative. An administrative furlough may be granted for programmatic reasons including pre-placement visits to residential programs, home visits, and medical services.

(3) Bench warrant. A bench warrant furlough is granted when a bench warrant is served on a youth and custody is transferred to the judicial jurisdiction issuing the warrant.

(4) Return to court. A return to court furlough is granted when a sentenced offender leaves a residential program for a court appearance to determine disposition as required by law.

(d) Administrative furloughs shall not be granted for youth assigned to placement in emergency shelters.

(e) Administrative furloughs shall not be granted to a disapproved home or one with a pending home evaluation, with one exception. Administrative furlough may be granted under conditions and criteria in (GAP) §87.91 [~~87.81~~] of this title (relating to Family Reintegration of Sex Offenders).

(f) Emergency and administrative furloughs shall not be granted unless such granting is consistent with custody and supervision requirements and restrictions contained in (GAP) §97.7 of this title (relating to Custody and Supervision Rating [~~(CRS)~~]).

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

Filed with the Office of the Secretary of State, on March 20, 2001.

TRD-200101586
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 424-6301

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CHAPTER 99. GENERAL PROVISIONS
SUBCHAPTER C. MISCELLANEOUS

37 TAC §99.90

The Texas Youth Commission (TYC) proposes new policy §, 99.90, concerning Vehicle Fleet Management. The new section establishes authority and responsibility for management and operation of TYC's vehicle fleet. This rule was implemented to comply with section 2171.104 of the Government Code which was mandated by the State of Texas General Services Commission (GSC).

Don McCullough, Acting Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be in compliance the legal requirement. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted to Sherma Cragg, Policy and Manuals Administrator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765.

The new section is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the broad rulemaking authority; and Texas Government Code, §2171.104, which requires state agencies to adopt rules or procedures consistent with the State Vehicle Fleet Management Plan.

The proposed rule implements the Texas Government Code, §61.034.

§99.90. Vehicle Fleet Management.

(a) Purpose. The purpose of this policy is to establish the authority and responsibility for management and operation of the Texas Youth Commission (TYC) vehicle fleet and to adopt the rules and procedures mandated in the State of Texas General Services Commission (GSC) Office of Vehicle Fleet Management's (OVFM) *State Vehicle Fleet Management Plan* in accordance with Section 2171.104, Government Code.

(b) Explanation of Terms Used.

(1) Fleet Manager - a TYC employee in the central office business services department who is responsible for day-to-day agency-wide fleet management. Responsibilities include guidance to central office and field fleet motor pool operations and maintenance, data collection and reporting, and acting as the central point of contact with the GSC OVFM.

(2) Office of Vehicle Fleet Management (OVFM) - the primary office at the GSC that developed, under direction of the Council on Competitive Government, the *State Vehicle Fleet Management Plan* and is responsible for the development and implementation of actions for improving administration and operation on the state's vehicle fleet. The OVFM has the authority to review agencies' vehicle utilization and receive data relative to agencies' fleet operations and maintenance. It has ultimate authority to establish and also to reduce an agency's vehicle authorization levels based on defined utilization criteria.

(3) Vehicle Control Officer (VCO) - a TYC employee responsible to manage the assigned vehicle fleet at each agency location and act as liaison and point of contact with the agency fleet manager.

(4) Vehicle Utilization Board (VUB) - a special TYC board appointed by the deputy executive director and chaired by the director of business services with members from the TYC finance and juvenile corrections departments that oversee development and implementation of TYC fleet management policy. Make recommendations to the executive committee relative to agency vehicle fleet matters such as vehicle authorization levels, purchasing and replacement.

(5) Mission Critical Vehicles - the vehicles assigned to individuals identified in key mission critical positions required by the executive director to commute in designated vehicles.

(6) Administrative Support Vehicles - the vehicles assigned to agency locations, including sedans and van, that are used to transport staff to training, meetings and other specific staff responsibilities offsite.

(7) Maintenance and Supply Vehicles - the assigned trucks and cargo vans used for the conduct of the basic logistics support (maintenance, supply, purchasing, delivery, etc.) function.

(8) Student Security and Client Support Vehicles - the vans used in conjunction with the campus security or youth transport functions.

(9) Special Requirements Vehicles - the heavy equipment or special purpose vehicles, such as dump trucks, fire trucks, and staked flatbed trucks, specifically authorized at some TYC locations because of unique circumstances or need.

(c) Applicability. This rule applies to all TYC staff, state-employed contract nurses, and volunteers under certain circumstances.

(d) Fleet Management Structure.

(1) The TYC executive committee will provide executive level oversight and support and be the final approval authority for major vehicle fleet decisions relative to policy, authorization levels, and appropriations requests based on the recommendations of the TYC VUB and agency fleet manager.

(2) The deputy executive director will appoint members to a cross-functional agency VUB.

(3) The fleet manager will make purchasing, replacement, repair, assignment and use, disposal decisions and recommendations to the VUB and executive committee as appropriate. Coordinates the rotation of authorized vehicles between agency locations based on mission and utilization requirements.

(4) The VCO will be the fleet manager in central office, business manager at the institutions, superintendent at the halfway houses, and quality assurance administrator/parole supervisor at the service areas. VCO's are responsible for maintenance and repair of vehicles, scheduling use of motor pool vehicles, collecting and reporting fleet data, securing and issuing keys and fuel cards and documenting return of same. The VCO is required to sign the

Agreement for Vehicle Control Officer form, BSD-807 and submit the form to the fleet manager in central office.

(e) Vehicle Fleet Size. TYC will comply with all purchasing restriction as outlined in the *State Vehicle Management Plan*. TYC will not exceed the current vehicle fleet size that is mandated by OVFM, except in cases of legislatively mandated program changes, federal program initiatives, or documented need resulting from program growth or changes that would increase the authorized fleet size. The Fleet Manager must certify in writing to OVFM any vehicles purchased due to legislatively mandated program changes, federal program initiatives, or need resulting from program growth or changes. All such waiver requests must be received in writing from the executive director and documentation must fully specify the mandate or need to exceed the vehicle cap.

(f) Explanation of Motor Pool.

(1) TYC will form statewide motor pools based on the primary function or utilization of each vehicle. Each agency vehicle will be assigned within an agency motor pool at a specific location and made available for checkout for official duty purposes where applicable. Each agency location will be authorized a specific number of vehicles within each designated utilization pool based on relative size or unique mission requirements. Vehicles will be rotated among locations and pools as necessary to meet utilization and efficiency criteria. Sub-pools may be formed at a location for more efficient management or utilization purposes. The following statewide pools will be formed.

(A) Mission Critical Vehicles. The executive director will assign vehicles to individual agency staff only after a written determination is made that it is critical to mission requirements. No personal use of these vehicles is authorized other than commuting or de minims use (such as a stop for personal errand on the way between a business delivery and the employee's home) while commuting. TYC will report to the OVFM the information required by the *State Vehicle Fleet Management Plan* on each vehicle by February 28, 2001 and thereafter as individual assignments occur.

(B) Administrative Support Vehicles. Pool vehicles will be made available for employee check out as needed with local responsibility for prioritizing their use in the event of conflicting requirements. Administrative vehicle utilization can be augmented with leased or rental vehicles within mission and budget requirements.

(C) Maintenance and Supply Vehicles. All agency locations are encouraged to minimize the requirements for registered motor vehicles and place more reliance on low speed utility conveyances such as golf carts, "Gators" or "Mules" for these functions.

(D) Student Security and Client Support Vehicles. The vans used in conjunction with the campus security or youth transport functions. Statewide youth transportation vehicles will be part of this pool. Vehicles will be outfitted with security enclosures where needed.

(E) Special Requirements Vehicles. The heavy equipment or special purpose vehicles, such as dump trucks, fire trucks, and staked flatbed trucks, specifically authorized at some TYC locations because of unique circumstances or need.

(2) Individual Vehicle Assignments. The executive director may assign state owned vehicles to an individual or executive employee on a regular basis only with written documentation that the assignment is critical to the mission of the agency. The following information must be reported to the OVFM as individual assignments occur. For specific policy and procedures regarding state vehicle assignment(s) refer to (PRS) §43.15 of this title (relating to State Vehicle Assignments).

(A) Vehicle identification number, license plate number, year, make, and model;

(B) name and position of the individual to whom it is assigned unless a determination is made by the executive committee that there is a law enforcement or security determination and the vehicle has been issued alias license plates; and

(C) reason the assignment is critical to the mission of the agency.

(3) TYC will establish and maintain the general minimum mileage criteria for its pooled vehicles based on the guidelines provided by OVFM. The agency fleet manager will track utilization and initiate actions to rotate vehicles between locations or pools to meet minimum utilization criteria. The agency fleet manager will identify unique requirements and justification for specific other minimum use criteria for OVFM consideration and waiver. The fleet manager will provide responses and justification to OVFM within 30 days of receipt of quarterly vehicle utilization reports.

(4) TYC will use one or more of the state contracted vendor cards for retail fuel dispensing services. Fuel cards will be issued for specific vehicles, not specific drivers. Unless specifically prohibited by manufacturer warranty or recommendations, all TYC vehicles operating on gasoline shall use regular unleaded gasoline. TYC employees will use self-service islands when refueling at retail fueling stations.

(5) TYC will establish vehicle replacement goals based on the purpose, age and mileage criteria published in the OVFM *State Vehicle Management Plan.*

(6) TYC will out-source maintenance and repair of fleet assets unless it is demonstrated to be more economical to perform those functions in-house. TYC will develop interagency agreements to obtain maintenance, repairs and fuel where feasible.

(7) TYC may dispose of vehicles identified as excess by the OVFM through the GSC Surplus Property Division process or through other approved surplus property disposal processes. TYC must certify the successful disposal of vehicles identified excess vehicles by OVFM within six months from notification. Vehicles identified for disposal by GSC are not eligible for replacement.

(8) TYC will capture and submit, through the fleet manager, fleet data to OVFM based on the criteria and timetable established in the *State Vehicle Management Plan.* TYC will maintain detailed supporting documentation for all reporting requirements. TYC will use the standardized vehicle reporting log developed by OVFM unless a different form is specifically approved by OVFM.

(g) Driving Requirements.

(1) Authorized Drivers. Persons authorized to drive a state owned vehicle, privately owned vehicle, or a leased vehicle on TYC business shall do so in a responsible manner obeying all state laws and in compliance with the following rules. This policy applies to vehicles which are to be driven on public roads, highways and on the grounds of TYC facilities. For specific procedures regarding authorized drivers refer to (PRS) §43.13 of this title (relating to Driving Requirements).

(2) General Driver Rules.

(A) State vehicles shall be used only for official business. Official business may include travel directly to an employee's home the night before official travel begins or travel directly from an employee's home to his/her work site the morning after official travel ends when such is authorized by the employee's supervisor and will expedite the employee's travel or otherwise make the most efficient

use of the employee's time. See (PRS) §43.13 of this title (relating to Driving Requirements).

(B) State owned vehicles will be available to TYC staff, volunteers, and contract nurses to transport youth at TYC staffed facilities in emergencies.

(3) Vehicle Accident. If the driver is involved in an accident, he/she should notify his/her supervisor and the VCO immediately. If the accident occurs on a public thoroughfare, the proper authorities must be notified. See (PRS) §43.13 of this title (relating to Driving Requirements).

(4) Use of Fuel Cards. TYC gasoline fuel cards assigned by TYC are to be used only for purchase of gasoline, standard preventive maintenance items (oil and filter changes, etc.) and car washes. TYC issued fuel cards may be used only in state owned vehicles and vehicle(s) leased for state proposes. See (PRS) §43.13 of this title (relating to Driving Requirements).

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

Filed with the Office of the Secretary of State, on March 20, 2001.

TRD-200101587
Steve Robinson
Executive Director
Texas Youth Commission
Earliest possible date of adoption: May 6, 2001
For further information, please call: (512) 424-6301

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

The Texas Department of Protective and Regulatory Services (TDPRS) proposes the repeal of §§700.337-700.344 and 700.346-700.348; and proposes new §§700.801-700.805, 700.820-700.824, 700.840-700.850, 700.860-700.863, 700.880, and 700.881, concerning the adoption assistance program, in its Child Protective Services chapter. The new sections are proposed in new Subchapter H, Adoption Assistance Program. The purpose of the repeals and new sections is to simplify the language of the adoption assistance rules so they are clearer to the public and private child-placing agencies. The proposal is intended to facilitate understanding of the law, eligibility requirements and application procedures, and enable private child-placing agencies to better fulfill their obligation to inform adoptive parents of the assistance benefits which may be available if they adopt a special needs child. The proposal is part of TDPRS's strategic plan initiative to review and revise rules to eliminate redundancy and conflict; maximize uniformity across program lines; and promote efficiency, effectiveness and accountability. In drafting the new rules, staff used the question and answer style as well as other plain language techniques.

TDPRS published proposed rules on this subject in the December 15, 2000, issue of the *Texas Register* (25 TexReg 12327), which TDPRS is withdrawing in this issue of the *Texas Register*. The new proposal reflects many changes resulting from ACYF-CB- PA-01-01, a policy announcement concerning adoption assistance eligibility, that TDPRS received after the rules were proposed in the *Texas Register*.

Mary Fields, Budget and Federal Funds Director, 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 government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that the sections will be better organized and easier to understand. There will be no effect on large, small, or micro-businesses because there is no change to the program requirements. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Susan Klickman at (512) 438-3302 in TDPRS's Child Protective Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-157, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under section 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 C. ELIGIBILITY FOR CHILD PROTECTIVE SERVICES

40 TAC §§700.337 - 700.344, 700.346 - 700.348

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

The repeals are proposed under Human Resources Code (HRC), §40.029, which provides the department with the authority to propose and adopt rules in compliance with state law and to implement departmental programs.

The repeals implement the Texas Family Code, Chapter 162, Subchapter D, Adoption Assistance Program, and Title IV-E of the Social Security Act (42 U.S.C. §673), which require that the department implement an adoption assistance program for special needs children.

§700.337. Eligibility Requirements for State-paid Adoption Subsidies.

§700.338. Additional Eligibility Requirements for Federal Title IV-E Adoption Assistance.

§700.339. Determination of Adoption Assistance Benefits.

§700.340. Effective Dates of Subsidy Benefits.

§700.341. Application and Right to Notification.

§700.342. Beginning the Subsidy.

§700.343. Reporting Changes.
§700.344. Right to Appeal.
§700.346. Reimbursement of Nonrecurring Adoption Expenses.
§700.347. Medical Assistance for Children Who Do Not Reside in the State That Signed the Adoption Assistance Agreement.
§700.348. Continuing Eligibility for Title IV-E Adoption Assistance in Subsequent Adoptions.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101711
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER H. ADOPTION ASSISTANCE PROGRAM

DIVISION 1. PROGRAM DESCRIPTION AND DEFINITIONS

40 TAC §§700.801 - 700.805

The new sections are proposed under Human Resources Code (HRC), §40.029, which provides the department with the authority to propose and adopt rules in compliance with state law and to implement departmental programs.

The new sections implement the Texas Family Code, Chapter 162, Subchapter D, Adoption Assistance Program, and Title IV-E of the Social Security Act (42 U.S.C. §673), which require that the department implement an adoption assistance program for special needs children.

§700.801. What do certain words and terms in this subchapter mean?

In Subchapter H, the following words and terms have the stated meanings:

(1) The words "I," "my," "you" and "your" refer to the adoptive parent(s) of a special needs child.

(2) The words "we," "us," "our" and "PRS" refer to the Texas Department of Protective and Regulatory Services (PRS) or any of its divisions or employees, including Child Protective Services (CPS).

(3) The word "child" refers to any child that meets the definition of a special needs child, as described in §700.804 of this title (relating to Who is a special needs child?).

(4) The term "Title IV-E" refers to the federal program for adoption assistance that is established under Title IV-E of the Social Security Act, 42 U.S.C. §673, and administered by PRS.

(5) The term "state adoption assistance" refers to the state program for adoption assistance established under Texas Family Code, §162.302.

(6) The term "AFDC eligible" means a child would have qualified for aid under the Texas State IV-A Plan (as in effect on July 16, 1996), with the exception that the child's and family's maximum resource limit is $10,000. Requirements include that the child live with a parent or specified relative and be deprived of parental support. Parental deprivation exists if one of the child's parents is dead, absent from the home, or has a mental or physical incapacity that prevents the parent from supporting or caring for the child, or the principal wage earner parent is unemployed.

(7) The term "licensed child-placing agency" or "LCPA" refers to a private, nonprofit agency that is licensed or certified by the State of Texas to place children for adoption.

(8) The term "adoptive parent(s)" refers to the person(s) who commit(s) to adopting a special needs child placed for adoption in accordance with licensing minimum standards for child- placing agencies.

(9) The terms "adoptive placement" and "placed for adoption" only refer to points in time during the period when PRS or the LCPA has managing conservatorship of the child, parental rights to the child are terminated, the adoptive parent(s) have an approved adoptive home study and the child is living with them under a written adoptive placement agreement prior to adoption consummation.

(10) The term "complete application" refers to all the forms and documents that must be filled out and received by PRS to process a request for adoption assistance. An application is not complete until we receive all the information and supporting documentation necessary to determine a child's eligibility.

(11) The word "agreement" refers to the written contract for adoption assistance that is legally binding because both parties have signed it agreeing to all terms and conditions.

(12) The term "deferred agreement" refers to the legally binding, written contract to provide adoption assistance in the future if the need develops. A deferred agreement is used when the child is eligible for adoption assistance and you are able to meet the child's current needs, but you may be unable to meet the child's needs in the future if circumstances change.

§700.802. What is adoption assistance?

(a) Adoption assistance is a program designed to facilitate the adoption of children with special needs. The program includes benefits to help meet the needs of your adopted child.

(b) The benefits that may be provided under the program are:

(1) Medicaid health coverage for the child;

(2) monthly payments to assist in meeting the child's needs; and

(3) reimbursement of one-time expenses directly related to completing the adoption process (nonrecurring expenses).

§700.803. Do all children placed for adoption by PRS get adoption assistance?

(a) No. Only a special needs child, in an approved adoptive placement, can qualify for adoption assistance. When we place a child for adoption, we first determine whether the child is eligible under Title IV-E. If the child is not eligible under Title IV-E, we determine whether the child is eligible under the state adoption assistance program.

(b) To receive any adoption assistance benefits, you must sign an agreement before the adoption is final. Exceptions can be made to this requirement only in certain circumstances, as described in §700.881 of this title (relating to Can my child still get benefits if I did not sign an agreement before the adoption?).

§700.804. Who is a special needs child?

(a) The child must be less than 18 years old and meet one of the following criteria when the adoptive placement agreement is signed:

(1) the child is at least six years old;

(2) the child is at least two years old and a member of a minority group that traditionally creates a barrier to adoption;

(3) the child is being adopted with a sibling or to join a sibling; or

(4) the child has a verifiable physical, mental, or emotional handicapping condition, as established by an appropriately qualified professional through a diagnosis that addresses:

(A) what the condition is; and

(B) that the condition is handicapping.

(b) The state must determine that the child cannot or should not be returned to the home of his parents.

(c) A reasonable effort must be made to find an adoptive placement without providing adoption assistance, unless doing so is against the child's best interests.

§700.805. Can a child who is placed by an LCPA get adoption assistance?

(a) Yes, but a special needs child placed for adoption by an LCPA can qualify for adoption assistance only by meeting the requirements of Title IV-E, as described in Division 2 of this subchapter (relating to Title IV-E Eligibility Requirements).

(b) You must sign an agreement before the adoption is final. Exceptions can be made to this requirement only in certain circumstances, as described in §700.881 of this title (relating to Can my child still get benefits if I did not sign an agreement before the adoption?).

(c) A special needs child placed for adoption by an LCPA is not eligible for the state adoption assistance program.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101712
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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DIVISION 2. TITLE IV-E ELIGIBILITY REQUIREMENTS

40 TAC §§700.820 - 700.824

The new sections are proposed under Human Resources Code (HRC), §40.029, which provides the department with the authority to propose and adopt rules in compliance with state law and to implement departmental programs.

The new sections implement the Texas Family Code, Chapter 162, Subchapter D, Adoption Assistance Program, and Title IV-E of the Social Security Act (42 U.S.C. §673), which require that the department implement an adoption assistance program for special needs children.

§700.820. How do I get Title IV-E adoption assistance for my child?

(a) To be eligible for any adoption assistance benefits, your child must be a special needs child and you must sign an agreement with us before the child's adoption is finalized. In addition, benefits are only available to those who meet the federal law requirements of U.S. citizenship or special immigration status, as described in §700.824 of this title (relating to What if the child is not a U.S. citizen?).

(b) When the additional Title IV-E eligibility requirements are met, as described in this division, you may be entitled to monthly payments and Medicaid coverage for your child in addition to the reimbursement of nonrecurring expenses.

(c) When the additional Title IV-E eligibility requirements are not met, the only benefit you can receive is reimbursement of nonrecurring expenses, as described in §700.850 of this title (relating to How do I get reimbursement of nonrecurring expenses?).

§700.821. What are the additional Title IV-E eligibility requirements?

A special needs child must be in an adoptive placement and meet one of the following conditions to be eligible for Medicaid and possible monthly payments under an agreement:

(1) The child is eligible for Supplemental Security Income (SSI) benefits, as determined by the Social Security Administration (SSA) during the adoptive placement;

(2) We determine that the child is AFDC eligible both:

(A) in the month that court proceedings began which resulted in the child's removal from the home; and

(B) in the month the adoption petition is filed;

(3) We already determined that the child was eligible for Title IV-E foster care assistance; or

(4) The child lives with a minor parent in foster care, and the child's costs are included in the Title IV-E foster care payments being made on behalf of the minor parent.

§700.822. How do you determine whether the child was AFDC eligible?

(a) To determine whether the child was AFDC eligible, we must consider the detailed circumstances of the home of the parent or relative from whom the court ordered the child to be removed. If the child was no longer living in the home when the court ordered removal,

(1) the child must have been living there at some point during the six months before the court removal proceedings began; and

(2) we must determine that the child would have been eligible for AFDC assistance had the child still been living in that home during the month the court proceedings began.

(b) We must also determine whether the child is still AFDC eligible at the time the adoption petition is filed.

§700.823. What is necessary for a court order to be considered a removal?

The very first court order addressing the fact that the child no longer lives at home must contain a judicial finding that it is contrary to the child's welfare, or not in the child's best interest, to remain in the home. A court order that follows a voluntary transfer of possession of a child to an LCPA cannot be characterized as a court removal.

§700.824. What if the child is not a U.S. citizen?

(a) If the child is not a U.S. citizen, then the child must meet one of the conditions specified in this subsection or in subsection (b) of this section before the agreement is signed:

(1) The child has been a permanent resident or other qualified alien (as described in 8 U.S.C. §1641(b)) for at least five years;

(2) The child entered the U.S. as a permanent resident or other qualified alien before August 22, 1996; or

(3) The child is a refugee or asylee (as defined in 8 U.S.C. §1613(b)).

(b) If the child does not meet one of the conditions listed in subsection (a) of this section, but has been a permanent resident or other qualified alien for less than five years, then the child is still eligible for adoption assistance if you are a U.S. citizen, permanent resident, or other qualified alien.

(c) A child who does not meet the conditions in subsections (a) or (b) of this section, including an undocumented child, is not eligible for Title IV-E adoption assistance.

(d) The child's citizenship or immigration status must be verified in accordance with federal law. If you are relying on the exception in subsection (b) of this section, your citizenship or immigration status must be verified in accordance with federal law.

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

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TRD-200101713
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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DIVISION 3. APPLICATION PROCESS, AGREEMENTS, AND BENEFITS

40 TAC §§700.840 - 700.850

The new sections are proposed under Human Resources Code (HRC), §40.029, which provides the department with the authority to propose and adopt rules in compliance with state law and to implement departmental programs.

The new sections implement the Texas Family Code, Chapter 162, Subchapter D, Adoption Assistance Program, and Title IV-E of the Social Security Act (42 U.S.C. §673), which require that the department implement an adoption assistance program for special needs children.

§700.840. What is the application process for adoption assistance?

(a) You must file a complete application with the adoption assistance staff in the PRS office in your area. Some of the information you are asked to provide is unrelated to determining your child's eligibility, but it may be used to discuss and negotiate the amount of monthly payments, as described in §700.844 of this title (relating to What is the maximum amount for monthly payments?).

(b) If we place the child for adoption, we inform you of the adoption assistance program and provide you with the application. We can help you fill out many of the required forms because we have access to the necessary information in our files.

(c) If an LCPA places the child, the LCPA must inform you of the adoption assistance program. You may need the LCPA to help you with the application and eligibility documentation. The LCPA can provide information directly to us on your behalf.

§700.841. When do I find out if my child is eligible?

We send you written notification of our decision within 30 days after we receive your complete application. If you do not receive the notification or you believe your application is not being processed promptly, you should contact the supervisor of the adoption assistance staff in the PRS office where you filed the application.

§700.842. What happens if my child is determined eligible?

(a) If we determine that the child is eligible for adoption assistance, we send you a proposed agreement that identifies the specific benefits for which your child is eligible. We must receive your signed agreement before you finalize the adoption. Benefits are not available until there is a legally binding agreement.

(b) If the child is eligible for benefits other than the reimbursement of nonrecurring expenses, we send you an agreement that may specify a monthly payment amount. If you are not offered the maximum monthly payment amount, as described in §700.844 of this title (relating to What is the maximum amount for monthly payments?), you can discuss and negotiate the amount with us before you sign and return the proposed agreement.

(c) If you and your child do not have any current need for adoption assistance, but reasonably expect to have a need in the future, you can sign a deferred agreement, as described in §700.801(12) of this title (relating to What do certain words and terms in this subchapter mean?).

(d) If the child is eligible for reimbursement of nonrecurring expenses, you cannot receive that benefit until after the adoption is finalized, as described in §700.850 of this title (relating to How do I get reimbursement of nonrecurring expenses?).

§700.843. What happens if my child is determined ineligible?

If we determine that the child is not eligible for adoption assistance, we send you written notification explaining the reasons for our decision and informing you of your right to appeal.

§700.844. What is the maximum amount for monthly payments?

(a) The monthly payment amount cannot exceed the level-of-care one (LOC 1) rate that is being paid by us for foster care maintenance as of the effective date of your agreement:

(1) The ceiling for the monthly payment amount is determined as follows:

(A) the daily LOC 1 rate is multiplied by 365 days;

(B) the result is divided by 12 months; and

(C) that result is rounded to the nearest whole dollar amount.

(2) This ceiling for monthly payments applies to all agreements and is not subject to negotiation or appeal. Exception: For agreements already in existence where the monthly payment exceeds the LOC 1 foster care rate, the ceiling will be the amount being paid by us on the date this section is adopted.

(b) The following factors are considered and discussed in negotiating and determining benefits:

(1) We evaluate your child's current need for services in relation to your family's income, expenses, circumstances, and plans for the future.

(2) Benefits are intended only to assist in meeting your child's current needs and your parental responsibilities.

(3) Any and all sources of income and support that are specifically designated for the child (such as Retirement, Survivors,

Disability Insurance (RSDI) or Veterans Administration (VA) benefits) must be applied toward meeting the child's needs.

(4) We do not consider costs associated with your choice to meet the child's needs through private sources when those needs can be met through other publicly funded sources.

(5) If the child needs special services not covered by your private insurance or Texas Medicaid, we must determine the actual cost of services available to meet those needs. If actual costs are not available, we determine a reasonable estimate of projected costs.

§700.845. Can my child get adoption assistance monthly payments in addition to Supplemental Security Income (SSI) benefits?

Only the Social Security Administration (SSA) can determine whether your child is eligible for SSI benefits. The SSA considers your family's financial resources in determining whether your child remains eligible for SSI benefits after adoption. If your child does remain eligible, the SSI benefits would be reduced by any amount you receive in adoption assistance monthly payments. If you choose to receive SSI benefits and do not sign an agreement with us before the adoption is final, you cannot return later and ask for adoption assistance if the SSI benefits stop.

§700.846. How is the effective date of the agreement determined?

(a) The effective date of the agreement is the month in which the child meets all eligibility requirements. If the child already meets all eligibility requirements when you apply, the effective date of the agreement cannot be more than 12 months before we receive your complete application. Benefits are not available for any period of time before the effective date of the agreement.

(b) The effective date of the agreement is always the first day of the month. A child cannot receive Medicaid and monetary payments from both the foster care and adoption assistance programs in the same month. If we are making foster care maintenance payments for the child, adoption assistance benefits begin the month after the foster care payments stop.

§700.847. When does the agreement end?

The agreement you sign is effective through the month in which your child turns 18 years old, unless terminated earlier.

§700.848. When can the agreement and benefits be terminated before my child turns 18 years old?

The agreement and benefits can be terminated when any of the following occurs:

(1) the adoptive placement ends before the adoption is consummated;

(2) we discover the child was mistakenly determined eligible for benefits;

(3) you are no longer legally responsible for the child's support, such as when your parental rights are terminated, or when the child emancipates, marries, or enlists in the military;

(4) we determine that you are no longer financially supporting the child;

(5) the child dies; or

(6) you request termination of benefits.

§700.849. Can benefits be suspended while the agreement is effective?

(a) Yes, we may suspend benefits, without your agreement, when any of the following occurs:

(1) we determine that the child is not living in your home and you are not supporting the child financially;

(2) we do not receive a certified copy of the Decree of Adoption within 24 months after the effective date of the agreement; or

(3) we do not receive your recertification form, as described in §700.862 of this title (relating to Why must I recertify my child's eligibility?).

(b) Benefits resume if we are able to determine that you and your child remain eligible. If you receive any monthly payments for a period of time when they could have been suspended, we may require you to repay the total amount or recover the overpayment by deducting amounts from future payments under a repayment plan.

§700.850. How do I get reimbursement of nonrecurring expenses?

(a) We must receive your signed agreement before you finalize the adoption. After you finalize the adoption, you can get reimbursement from us for your nonrecurring expenses. These expenses are defined as reasonable and necessary adoption fees, court costs, attorney fees, and "other expenses" that are directly related to the legal adoption of your child.

(b) Other expenses include the costs of adoption incurred by you or by someone else who you must reimburse. Examples of these expenses, when necessary to complete the adoption process, include the adoption home study, health and psychological examinations, supervision of the adoptive placement, transportation and reasonable costs of lodging and food for you or your child.

(c) We must receive your claim for reimbursement no later than 18 months after the adoption is finalized. If your right to reimbursement is authorized by a PRS hearing order after the adoption is final, we must receive your claim as soon as possible.

(d) You must submit your receipts or other proof of payment, such as cancelled checks, and a certified copy of the Decree of Adoption. You are reimbursed only for expenses actually incurred that are not reimbursable by a third party. The maximum amount that you can receive as reimbursement for nonrecurring expenses is $1500 per child.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101714
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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DIVISION 4. CHANGES IN CIRCUMSTANCES

40 TAC §§700.860 - 700.863

The new sections are proposed under Human Resources Code (HRC), §40.029, which provides the department with the authority to propose and adopt rules in compliance with state law and to implement departmental programs.

The new sections implement the Texas Family Code, Chapter 162, Subchapter D, Adoption Assistance Program, and Title IV-E of the Social Security Act (42 U.S.C. §673), which require that

the department implement an adoption assistance program for special needs children.

§700.860. What if my child's or family's circumstances change?

(a) You must promptly inform us of the following changes in circumstances regarding your adopted child or your family:

(1) any name or address changes;

(2) a change in marital status;

(3) a change in where the child is living;

(4) a change in the child's legal status; and

(5) any change(s) that may affect continuing eligibility for benefits, as described in §700.848 of this title (relating to When can the agreement and benefits be terminated before my child turns 18 years old?).

(b) If you are not already receiving the maximum monthly payment, you may request an increase when there is a change of circumstances affecting your adopted child's current needs or your family's ability to meet those needs. You must submit a written request for an increase to the local PRS office that processed your application and specify the change(s) in your child's or family's circumstances. Any request for an increase in monthly payment amount is subject to the requirements and limitations described in §700.844 of this title (relating to What is the maximum amount for monthly payments?).

§700.861. Will my child receive benefits if I move to, or live in, another state?

(a) If you have an adoption assistance agreement with another state that provides Medicaid coverage for your child, we will provide Texas Medicaid after you move here. Only medical assistance benefits covered by the Texas Medicaid program are provided. The state that entered into the agreement with you remains responsible to provide any monetary payments or other services specified in that agreement.

(b) If you have an agreement with us and you move to another state, we provide Texas Medicaid coverage only if the state where you live does not agree to cover your child under its state Medicaid program. We remain responsible for any monthly payments specified in your agreement no matter where you live, which is why you must keep us informed of your current address.

§700.862. Why must I recertify my child's eligibility?

We require the recertification of your child's eligibility to ensure that you and your child remain eligible for benefits as provided by the agreement. We may periodically send you a recertification form to fill out, sign and return to us within 60 days. Your monthly payments can be suspended if we do not receive your recertification form on time.

§700.863. Does a child remain eligible for benefits in a subsequent adoption?

(a) Yes, a child remains eligible for adoption assistance in a subsequent adoption if the following conditions are met before finalization of the subsequent adoption:

(1) we determine that the child is a special needs child, as described in §700.804 of this title (relating to Who is a special needs child?); and

(2) a new adoption assistance agreement is signed.

(b) Benefits may be suspended if we do not receive a certified copy of the Decree of Adoption for the subsequent adoption within 24 months after the effective date of the new agreement.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101715
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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DIVISION 5. APPEALS AND FAIR HEARINGS

40 TAC §700.880, §700.881

The new sections are proposed under Human Resources Code (HRC), §40.029, which provides the department with the authority to propose and adopt rules in compliance with state law and to implement departmental programs.

The new sections implement the Texas Family Code, Chapter 162, Subchapter D, Adoption Assistance Program, and Title IV-E of the Social Security Act (42 U.S.C. §673), which require that the department implement an adoption assistance program for special needs children.

§700.880. What are my rights to appeal a PRS decision regarding adoption assistance benefits?

(a) You have the right to request a hearing whenever adoption assistance benefits are denied, delayed, suspended, reduced, or terminated. A hearing is also available when the processing of your application is unreasonably delayed. The hearing, as described in §730.1102 of this title (relating to Definitions), provides you the opportunity to appeal a decision made in a local PRS office to a higher authority within PRS.

(b) We must receive your written request for a hearing within 90 days after you receive written notification of our decision. At the hearing, you can represent yourself or have another person, including an attorney, represent you.

(c) There is no right to appeal our decision to provide you all the benefits available, including the maximum monthly payment allowed, as described in §700.844 of this title (relating to What is the maximum amount for monthly payments?).

§700.881. Can my child still get benefits if I did not sign an agreement before the adoption?

(a) Yes, but only after you request a hearing and show that there is good reason to excuse your failure to have a signed agreement. Some good reasons that provide for a hearing are:

(1) We placed your child for adoption but did not inform you of the adoption assistance program before the adoption was final.

(2) Facts relating to the child's eligibility for adoption assistance were known but not disclosed to you before the adoption.

(3) The child's physical, mental, or emotional handicapping condition could not be diagnosed before the adoption, but was later diagnosed by an appropriately qualified professional as having existed at the time of the adoptive placement.

(4) We made an error in determining that your child was not eligible before the adoption was final.

(5) We denied you assistance because of a means test.

(b) In the hearing, you have the burden to prove both:

(1) your reason for not having a signed agreement before the adoption; and

(2) that your child met all eligibility requirements before the adoption.

(c) If we agree that your child was eligible before the adoption and your failure to have a signed agreement should be excused, we can sign an agreed order with you and avoid having a hearing. The hearing officer must approve the agreed order, and you must sign an agreement consistent with its provisions, before you can receive benefits.

This 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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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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CHAPTER 700. CHILD PROTECTIVE SERVICES

The Texas Department of Protective and Regulatory Services (TDPRS) proposes the repeal of §700.516, concerning administrative review of investigation findings; proposes new §700.516, concerning administrative review of investigation findings; and proposes an amendment to §700.605, concerning prerequisites for release hearings, in its Child Protective Services chapter. The purpose of the proposal is to revise the rules concerning administrative review of investigation findings (ARIF) to address recent changes in the program. The proposal also reorganizes and simplifies the rules to provide persons designated as perpetrators of child abuse or neglect and the general public with an up-to-date, clear, succinct and legally sufficient statement of the person's rights and the agency's obligations and responsibilities in conducting administrative reviews of investigation findings.

Mary Fields, Budget and Federal Funds Director, 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 government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that persons found to have abused or neglected children will better understand the process by which they can seek to challenge the findings of the investigation involving them. There will be no effect on large, small, or micro-businesses because these rules do not impose any new requirements on these kinds of businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Kay Love at (512) 438-3305 in TDPRS's Child Protective Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-170, Texas Department of Protective and Regulatory Services E-611, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

SUBCHAPTER E. INTAKE, INVESTIGATION, AND ASSESSMENT

40 TAC §700.516

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

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.

The repeal is proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs.

The repeal implements the Texas Family Code, §261.309, which requires that TDPRS by rule establish policies and procedures to resolve complaints relating to and conduct reviews of child abuse or neglect investigations conducted by TDPRS.

§700.516. Administrative Review of Investigation Findings.

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

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TRD-200101745
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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The new section is proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs.

The new section implements the Texas Family Code, §261.309, which requires that TDPRS by rule establish policies and procedures to resolve complaints relating to and conduct reviews of child abuse or neglect investigations conducted by TDPRS.

§700.516. Administrative Review of Investigation Findings.

(a) The purpose of an Administrative Review of Investigation Findings (ARIF) is to provide an informal review process for a person who has been designated as a perpetrator or victim/perpetrator of child abuse or neglect as specified in §700.512(b)(2) or (3) of this title (relating to Conclusions about Roles).

(b) To be eligible, the designated perpetrator must request an ARIF, in writing, within 45 days after receiving notice of the findings of the investigation.

(c) A person is not entitled to an ARIF for a finding of abuse or neglect if a court of competent jurisdiction has already issued a ruling consistent with that specific finding.

(d) Except as provided in subsection (e) of this section, TDPRS must within 45 days after the date on which a request for an ARIF is received:

(1) conduct the ARIF; or

(2) notify the requestor that the request has been denied because the requestor is not eligible for an ARIF, as specified in this section.

(e) TDPRS may postpone the conduct of an ARIF when there is a pending civil or criminal suit or an ongoing criminal investigation relating to the same acts or omissions involved in TDPRS's finding of abuse or neglect. An ARIF that is postponed for this reason must be conducted within 45 days from notification of the completion of the suit or criminal investigation that caused the postponement.

(f) The ARIF is conducted by a TDPRS employee (the "reviewer") who was not involved in the investigation and did not directly supervise the investigation. The ARIF is an informal review in which the requestor, investigation worker, and investigation supervisor may appear, make statements, provide relevant written materials, and ask questions. The requestor has the right to be represented by another individual. Other interested individuals may participate or provide information at the sole discretion of the reviewer.

(g) The reviewer may review the investigation case record, ask questions, and gather other relevant information. The formal rules of evidence do not apply. The reviewer may consider all allegations relating to the investigation, including allegations that were "reason-to-believe," "unable-to-determine," or "ruled-out" at the conclusion of the investigation, and the evidence gathered during the investigation and the ARIF process. The reviewer must confirm that decisions of "reason-to-believe" are supported by a preponderance of the evidence.

(h) After completing the ARIF, the reviewer must timely issue a written decision that upholds, reverses, or alters the original investigation findings. An original finding of "reason-to-believe" for abuse or neglect may be upheld, or may be reversed to a finding of either "unable-to-determine" or "ruled-out." A finding may be altered with respect to the type of abuse or neglect found to have occurred. For example, an original finding of "reason-to-believe" for "physical abuse" of a child may be altered to a finding of "reason-to-believe" for "neglectful supervision" of the child. A "reason-to-believe" finding may be altered as to the type of abuse or neglect even when the original finding with respect to that same type of abuse or neglect had been "ruled-out" or "unable-to-determine."

(i) If the reviewer's decision reverses or alters any of the original investigation findings, TDPRS must change its records regarding the outcome of the investigation to reflect the reviewer's decision.

(j) Notwithstanding anything in this section, if an individual is entitled to an administrative hearing before the State Office of Administrative Hearings (SOAH), TDPRS may, at its sole discretion, waive the conduct of an ARIF and proceed directly to the SOAH hearing.

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

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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER F. RELEASE HEARINGS

40 TAC §700.605

The amendment is proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs.

The amendment implements the Texas Family Code, §261.309, which requires that TDPRS by rule establish policies and procedures to resolve complaints relating to and conduct reviews of child abuse or neglect investigations conducted by TDPRS.

§700.605. Prerequisites for Release Hearings.

(a) (No change.)

(b) Prior [~~completion of an~~] administrative review of investigation findings. If the person filing the appeal has not already been given an Administrative Review of Investigation Findings (ARIF) relating to those same findings, as provided under §700.516 of this title (relating to Administrative Review of Investigation Findings), TDPRS may, at its own discretion, offer an ARIF prior to scheduling a release hearing.

[~~(1) Before a release hearing is conducted, TDPRS' Protective Services for Families and Children (PSFC) must conduct an administrative review of the investigation findings as specified in §700.516 of this title (relating to Administrative Review of Investigation Findings), unless PSFC and the designated perpetrator or designated victim/perpetrator agree to waive the administrative review.~~]

[~~(2) Any administrative review of current or past investigation findings is sufficient to satisfy the requirement specified in paragraph (1) of this subsection as long as:~~]

[~~(A) the investigation findings include a designation of the person who has requested the release hearing as a designated perpetrator or designated victim/perpetrator of child abuse or neglect as specified in §700.512(b)(1) of this title (relating to Conclusions About Roles); and~~]

[~~(B) the individual who conducts the review confirms that the designation was supported by a preponderance of the evidence.~~]

This 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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Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
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For further information, please call: (512) 438-3437

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CHAPTER 701. COMMUNITY INITIATIVES
SUBCHAPTER B. COMMUNITIES IN SCHOOLS

40 TAC §701.271

The Texas Department of Protective and Regulatory Services (TDPRS) proposes an amendment to §701.271, concerning appropriated state and federal funds, in its Community Initiatives chapter. The purpose of the amendment is to allow TDPRS some flexibility in implementing Communities In Schools (CIS) funding allocation methodology. This flexibility may be used to limit the amount of money a local CIS program might lose due to a new biennial allocation calculation. Failure to limit such losses

could significantly impact service delivery by many local CIS programs.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed section will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Fields also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be minimal disruption to local CIS programs because of a reduction of state funding. There will be no effect on large, small, or micro-businesses because they are not stakeholders in the CIS funding formula. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of the proposal may be directed to Thomas Chapmond at (512) 438-3309 in TDPRS's Prevention and Early Intervention Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-172, Texas Department of Protective and Regulatory Services E-611, 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 this rule. Accordingly, the department is not required to complete a takings impact assessment regarding this rule.

The amendment is proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs, and the Texas Family Code, §264.746, which authorizes the Texas Department of Protective and Regulatory Services to develop and implement an equitable funding formula for the funding of local Communities In Schools programs.

The amendment implements the Texas Family Code, §264.746.

§701.271. Appropriated State and Federal Funds.

(a) (No change.)

(b) Continuation Funding.

(1) (No change).

(2) Notwithstanding subsection (b) of this section, TDPRS may choose, for the purpose of minimizing disruption in services due to loss of funding, to limit the annual amount of lost funding from one biennium to the next to a maximum of 50% of the calculated loss per contractor, as determined by the funding formula in subsection (b) [~~to allocate as necessary to maintain the funding levels initially allocated by the Texas Workforce Commission for fiscal year 1999. Levels initially allocated shall refer to funds allocated at the beginning of fiscal year 1999 to the existing CIS programs. This paragraph shall expire August 31, 2000~~].

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101749

C. Ed Davis

Deputy Director, Legal Services

Texas Department of Protective and Regulatory Services

Proposed date of adoption: May 25, 2001

For further information, please call: (512) 438-3437

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CHAPTER 720. 24-HOUR CARE LICENSING

The Texas Department of Protective and Regulatory Services (TDPRS) proposes amendments to §§720.31, 720.120, 720.131, 720.133, 720.135, 720.137, 720.201, 720.203, 720.205, 720.207, 720.243, 720.305, 720.326, 720.361, 720.363, 720.365, 720.367,720.368, 720.370, 720.372, 720.374, 720.420, 720.423, 720.440, 720.501, 720.506, 720.508, 720.520, 720.523, 720.530, 720.540, 720.550, 720.570, 720.916, 720.923, and 720.1503 - 720.1506; and proposes the repeal of §§720.424, 720.425, 720.447, 720.509 - 720.511, 720.531 - 720.534, 720.547, 720.557, and 720.1507, concerning behavior intervention in residential child-care facilities, foster homes, foster group homes, and child-placing agencies, in its 24-Hour Care Licensing chapter. The purpose of the proposal is to delete obsolete information concerning behavior intervention. TDPRS adopted new §§720.1001 - 720.1013 to govern the use of behavior intervention effective September 1, 2000. Those rules established precedence over all the other behavior intervention information in Chapter 720. However, the obsolete rules create confusion and TDPRS is deleting them. This proposal also changes obsolete definitions in the residential child care minimum standards to bring the rules up to date.

Mary Fields, Budget and Federal Funds Director, 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 government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be that obsolete sections will be deleted. There will be no effect on large, small, or micro-businesses because the sections do not impose new requirements on the cost of doing business, do not require the purchase of any new equipment, and should not require any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Lizet Alaniz at (512) 438-4538 in TDPRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-167, Texas Department of Protective and Regulatory Services E-611, 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. STANDARDS FOR CHILD-PLACING AGENCIES

40 TAC §720.31

The amendment is proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendment implements the Human Resources Code, §42.029 and §42.042.

§720.31. Problem Management.

[~~(a) General requirements.~~]

[~~(1) The child-placing agency must have written policies to guide caregivers in management of problem behavior of children in substitute care or adoptive placement prior to consummation. The policies must also include measures for positive responses to appropriate behavior. The agency must give copies of the policies to staff, foster parents, adoptive parents, and to birth parents or managing conservators.~~]

(a) [~~(2)~~] Disciplinary measures used by caregivers must:

(1) [~~(A)~~] be consistent with the agency's policies;

(2) [~~(B)~~] not be physically or emotionally damaging to the child; and

(3) [~~(C)~~] be individualized to meet each child's needs.

(b) [~~(3)~~] Only adult caregivers may discipline a child.

(c) [~~(4)~~] Children must not be subjected to any harsh, cruel, unusual, unnecessary, demeaning, or humiliating punishment.

(d) [~~(5)~~] Children must not be denied food, mail, or visits with their families as punishment.

(e) [~~(6)~~] Children must not be threatened with the loss of placement [~~as a means of controlling behavior~~].

(f) [~~(7)~~] The reasons for any punishment or restriction must be explained to the child when the measures are imposed.

(g) [~~(8)~~] Physical punishment must not be used with any child placed in substitute care or in an adoptive placement prior to consummation of the adoption.

(h) [~~(9)~~] If a child is restricted to a foster or adoptive home for more than 24 hours, the restrictions must be recorded in the child's record.

[~~(b) Restraint and seclusion.~~]

[~~(1) If the agency's policies permit the use of any form of restraint, this must be limited to emergency use of personal restraint.~~]

[~~(2) Restraining measures must not be used as punishment, as a substitute for effective treatment or program, or for the caregiver's convenience.~~]

[~~(3) If restraining measures are used, only such force as is reasonable and necessary may be used.~~]

[~~(4) If the agency authorizes the use of restraint for a child, caregivers must be trained in the type(s) of restraint authorized before the child is placed.~~]

[~~(5) Personal restraint may be used only when a child's behavior endangers himself or others.~~]

[~~(6) The child must be released from personal restraint as soon as he is no longer a danger to himself or others.~~]

[~~(7) Any use of personal restraint must be documented in the child's record, including:~~]

[~~(A) the date and time the caregiver began using the restraint and the name of the caregiver using it;~~]

[~~(B) a description of the specific behaviors necessitating the use of the restraint;~~]

[~~(C) the type of restraint used and the length of time the child was restrained; and~~]

[~~(D) any injury the child sustained as a result of the incident or the use of restraint.~~]

[~~(8) The use of personal restraint must be evaluated as part of the next service plan review. The agency must consider alternative strategies to handle the behavior that required using personal restraint. This evaluation and instructions to caregivers must be documented in the child's record.~~]

[~~(9) Except as permitted in Chapter 720, Subchapter S, Standards for Child Care Facilities Serving Children with Autistic-like Behavior, of this title, mechanical restraints, seclusion, or placing a child in a locked room must not be used in an agency home or adoptive placement. Protective devices may only be used when prescribed by a physician.~~]

[~~(10) At admission, the child-placing agency must explain to children able to comprehend the information, the agency's policies and practices on the use of restraint. The explanation must include who is permitted to do a restraint, the things caregivers must first try to do to defuse the situation and avoid the use of restraint, the kinds of situations in which restraint may be used, the types of restraints authorized by the agency, what a child needs to do to end the use of a restraint, and the way to report an inappropriate restraint. This explanation must be documented in the child's record.~~]

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101732
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER B. STANDARDS FOR AGENCY HOMES

40 TAC §720.120

The amendment is proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendment implements the Human Resources Code, §42.029 and §42.042.

§720.120. Children's Rights.

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

(c) Discipline shall be consistent with the policies of the child-placing agency. There shall be no cruel, harsh, unusual, or unnecessary punishment. The foster parents shall keep a record of the physical punishment administered to children and the imposition of restrictions to the agency home that exceed 24 hours.

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

(4) Any discipline [~~or control~~] shall be appropriate to the child's age and developmental level.

(5)-(7) (No change.)

[~~(d) Children shall not be placed in a locked room.~~]

[~~(e) Physical holding as a method of restraint shall be used only when necessary to protect the child from injury to self or others.~~]

[~~(1) The use of holding and the length of time used shall be reported to the agency and recorded in the child's case record.~~]

[~~(2) Mechanical restraints shall not be used.~~]

[~~(3) At admission, the foster parents must explain to children able to comprehend the information, the home's policies and practices on the use of restraint. The explanation must include who can do a restraint, the things caregivers must first try to do to defuse the situation and avoid the use of restraint, the kinds of situations in which restraint may be used, the types of restraints authorized by the agency under which the home operates, what a child needs to do to end the use of a restraint, and the way to report an inappropriate restraint. This explanation must be documented in the child's record.~~]

This 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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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER C. STANDARDS FOR HABILITATIVE AND THERAPEUTIC AGENCY HOMES

40 TAC §§720.131, 720.133, 720.135, 720.137

The amendments are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendments implement the Human Resources Code, §42.029 and §42.042.

§720.131. Personnel Staffing Standards for Habilitative Agency Homes.

(a) (No change.)

(b) The child-placing agency must have a psychologist available for diagnosis, treatment, and consultation.

(1) He or she must be a psychologist <u>licensed as set forth in the Texas Occupations Code, Chapter 501</u> [~~as defined by the Psychologists' Certification and Licensing Act~~].

(2) (No change.)

§720.133. Child Care, Development, and Training Standards for Habilitative Agency Homes.

(a)-(c) (No change.)

(d) Children's rights.

[~~(1)~~] Discipline must be consistent with the policies of the child-placing agency. There must be no cruel, harsh, unusual, or unnecessary punishment.

<u>(1)</u> [~~(A)~~] Only foster parents or adult caregivers may discipline a child.

<u>(2)</u> [~~(B)~~] Children must not be subjected to verbal remarks that belittle or ridicule them or their families.

<u>(3)</u> [~~(C)~~] Children must not be denied food, mail, or family visits as punishment.

<u>(4)</u> [~~(D)~~] Children must not be threatened with the loss of foster home placement as punishment.

<u>(5)</u> [~~(E)~~] Discipline must fit the needs of the child.

<u>(6)</u> [~~(F)~~] Children must not be punished by shaking, striking, or spanking.

<u>(7)</u> [~~(G)~~] A record must be kept of the imposition of restrictions to the agency home that exceed 24 hours.

[~~(2) Physical holding for restraint or mechanical restraints must be used only to protect the child from injury to self or others.~~]

[~~(A) In an emergency, only physical holding can be used unless a physician orders mechanical restraint. The nature of the emergency must be documented.~~]

[~~(B) The need for restraint, the type of restraint used, and the length of time the restraint was used must be recorded in the child's record.~~]

[~~(C) If physical holding for restraint is to be used other than in an emergency, it can be used only upon the orders of a licensed physician.~~]

[~~(D) Any order for physical restraint must designate the type of restraint, the circumstances, and the duration of its use.~~]

(e) (No change.)

§720.135. Personnel Standards For Therapeutic Agency Homes.

(a) Staffing. The child-placing agency must provide staff necessary to ensure the proper care, treatment, and safety of the residents.

(1) (No change.)

(2) The child-placing agency must arrange to obtain services of a professional consultant team which has responsibility for supervising and reviewing the needs and treatment of residents. Documentation of the services provided by these professionals and the frequency of services shall be made. This professional team must include:

(A) (No change.)

(B) a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act]; and

(C) (No change.)

(b) (No change.)

§720.137. Child Care, Development, and Training Standards for Therapeutic Agency Homes.

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

(c) Residents' rights.

[(1)] Discipline must be consistent with the policies of the child-placing agency and must not be physically or emotionally damaging. There must be no cruel, harsh, unusual, or unnecessary punishment.

(1) [(A)] Only foster parents or adult caregivers can discipline residents.

(2) [(B)] Residents must not be subjected to verbal remarks that belittle or ridicule them or their families.

(3) [(C)] Residents must not be denied food, mail, or family visits as punishment.

(4) [(D)] Discipline must fit the needs of each resident.

(5) [(E)] Residents must not be punished by shaking, striking, or spanking.

(6) [(F)] A record must be kept of the imposition of restrictions to the agency home that exceed 24 hours.

(7) [(G)] Residents must not be threatened with the loss of foster home placement as punishment. Potential moving to a more restrictive setting must be presented as an opportunity for healthier growth.

[(2) Physical holding for restraint can be used only in an emergency and when necessary to protect the resident from injury to self or others. When physical restraint is used, the circumstances, including the length of time the restraint was used, must be documented in the resident's record. The use of mechanical restraint or seclusion is prohibited.]

(d) (No change.)

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

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TRD-200101734
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER D. STANDARDS FOR HABILITATIVE AND THERAPEUTIC FAMILY HOMES

40 TAC §§720.201, 720.203, 720.205, 720.207

The amendments are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendments implement the Human Resources Code, §42.029 and §42.042.

§720.201. Personnel-Staffing Standards for Habilitative Family Homes.

(a) (No change.)

(b) The habilitative family home must have a psychologist available for diagnosis, treatment, and consultation.

(1) He or she must be a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act].

(2) (No change.)

§720.203. Child Care, Development, and Training Standards for Habilitative Family Homes.

(a)-(c) (No change.)

(d) Children's rights.

[(1)] The habilitative family home must have written policies regarding methods used for [control and] discipline of children. The policies must be available to foster parents and adult caregivers. The home must also provide written information to the parents or managing conservators that identifies the person or office that parents or managing conservators can contact if they feel their children's rights have been violated. Copies of the discipline policy must be submitted to the department with each application for a license and at any time a change is made in the policy. Discipline must be consistent with the policies of the home and must not be physically or emotionally damaging.

(1) [(A)] Only foster parents or adult caregivers can discipline children.

(2) [(B)] Children must not be subjected to cruel, harsh, unusual, or unnecessary punishment.

(3) [(C)] A record must be kept of the imposition of restrictions to the foster home that exceed 24 hours.

(4) [(D)] Children must not be subjected to verbal remarks that belittle or ridicule them or their families.

(5) [(E)] Children must not be denied food, mail, or family visits as punishment.

(6) [(F)] Children must not be threatened with the loss of foster home placement as punishment.

(7) [(G)] Any discipline [or control] must fit the needs of each child.

(8) [(H)] Children must not be punished by shaking, striking, or spanking.

[(2) Physical holding or mechanical restraints must be used only to protect the child from injury to self or others.]

[(A) In an emergency, only physical holding can be used, unless a physician orders mechanical restraint. The nature of the emergency must be documented.]

[(B) The need for restraint, the type of restraint used, and the length of time the restraint was used must be recorded in the child's record.]

[(C) If physical holding for restraint is to be used other than in an emergency, it can be used only upon the orders of a licensed physician.]

[(D) Any order for restraint must designate the type of restraint, the circumstances, and the duration of its use.]

(e) (No change.)

§720.205. Personnel Standards for Therapeutic Family Homes.

(a) Staffing. The therapeutic family home must provide staff necessary to ensure the proper care, treatment, and safety of the residents.

(1) (No change.)

(2) The therapeutic family home must arrange to obtain services of a professional consultant team which has responsibility for supervising and reviewing the needs and treatment of residents. Documentation of the services provided by these professionals and the frequency of services shall be made. This professional team must include:

(A) (No change.)

(B) a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act]; and

(C) (No change.)

(b) (No change.)

§720.207. Child Care, Development, and Training Standards for Therapeutic Family Homes.

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

(c) Residents' rights.

[(1)] The therapeutic family home must have written policies regarding methods used for [control and] discipline of children. The policies must be available to appropriate staff. The home must also provide written information to the parents or managing conservators that identifies the person or office that parents or managing conservators can contact if they feel their children's rights have been violated. Copies of the home's discipline policy must be submitted to the department with each application for a license and resubmitted at any time a change is made in policy. Discipline must be consistent with the policies of the home and must not be physically or emotionally damaging.

(1) [(A)] Only foster parents or adult caregivers can discipline residents.

(2) [(B)] Residents must not be subjected to cruel, severe, unusual, or unnecessary punishment.

(3) [(C)] A record must be kept of the imposition of restrictions to the foster home that exceed 24 hours.

(4) [(D)] Residents must not be subjected to verbal remarks that belittle or ridicule them or their families.

(5) [(E)] Residents must not be denied food, mail, or family visits as punishment.

(6) [(F)] Residents must not be threatened with the loss of foster home placement as punishment. Potential moving to a more restrictive setting must be presented as an opportunity for healthier growth.

(7) [(G)] Any discipline [or control] must fit the needs of each resident.

(8) [(H)] Residents must not be punished by shaking, striking, or spanking.

[(2) Physical restraint can be used only in an emergency and when necessary to protect the resident from injury to self or others. When physical restraint is used, the circumstances, including the length of time the restraint was used, must be documented in the resident's record. The use of mechanical restraint or seclusion is prohibited.]

[(3) A resident must not be placed alone in a locked room.]

(d) (No change.)

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

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TRD-200101735
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER E. STANDARDS FOR FOSTER FAMILY HOMES

40 TAC §720.243

The amendment is proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendment implements the Human Resources Code, §42.029 and §42.042.

§720.243. Children's Rights and Privileges.

(a)-(g) (No change.)

(h) Discipline shall be consistent with the policies of the foster family home. The home shall provide copies of the discipline policies to the children's parents or managing conservators. The home shall also provide written information to the parents or managing conservators that identifies the person or office that parents or managing conservators can contact if they feel their children's rights have been violated. Copies of the foster family home's discipline policy shall be submitted to the department with each application for a license and resubmitted at any time a change is made in policy.

(1)-(9) (No change.)

(10) No form of discipline[, control,] or punishment shall be administered to children that violates state laws that protect children from abuse and neglect.

[(i) Children shall not be placed in a locked room.]

[(j) Physical holding as a form of restraint shall be used only when necessary to protect the child from injury to self or others. The use of physical holding and the length of time used shall be recorded

in the child's case record. Mechanical restraints shall not be used. At admission, the foster parents must explain to children able to comprehend the information, the home's policies and practices on the use of restraint. The explanation must include who can do a restraint, the things caregivers must first try to do to defuse the situation and avoid the use of restraint, the kinds of situations in which restraint may be used, the types of restraints authorized by the home, what a child needs to do to end the use of a restraint, and the way to report an inappropriate restraint. This explanation must be documented in the child's record.]

This 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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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER F. STANDARDS FOR FOSTER GROUP HOMES

40 TAC §720.305, §720.326

The amendments are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendments implement the Human Resources Code, §42.029 and §42.042.

§720.305. Children's Rights and Privileges in Homes Responsible to a Child-Placing Agency.

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

(g) Discipline shall be consistent with the policies of the child-placing agency. There shall be no cruel, harsh, unusual, or unnecessary punishment. A record shall be kept at the foster group home of the physical punishment administered to children and the imposition of restrictions to the foster group home that exceed 24 hours.

(1)-(7) (No change.)

(8) No form of discipline[, ~~control,~~] or punishment shall be administered to children that violates state laws that protect children from abuse and neglect.

~~[(h) Physical holding as a form of restraint shall be used only to protect a child from injury to self or others. The use of physical holding and the length of time used shall be recorded in the child's case record. Mechanical restraint shall not be used.]~~

~~[(i) Children shall not be placed in a locked room.]~~

~~[(j) At admission, the foster parents must explain to children able to comprehend the information, the home's policies and practices on the use of restraint. The explanation must include who can do a restraint, the things caregivers must first try to do to defuse the situation and avoid the use of restraint, the kinds of situations in which restraint may be used, the types of restraints authorized by the agency under which the home operates, what a child needs to do to end the use of a restraint, and the way to report an inappropriate restraint. This explanation must be documented in the child's record.]~~

§720.326. Children's Rights and Privileges in an Independent Foster Group Home.

(a)-(l) (No change.)

~~[(m) Physical holding as a form or restraint shall be used only to protect the child from injury to self or others. The use of physical holding and the length of time it was used shall be recorded in the child's case record. Mechanical restraints shall not be used.]~~

~~[(n) Children shall not be placed in a locked room.]~~

~~[(o) At admission, the foster parents must explain to children able to comprehend the information, the home's policies and practices on the use of restraint. The explanation must include who can do a restraint, the things caregivers must first try to do to defuse the situation and avoid the use of restraint, the kinds of situations in which restraint may be used, the types of restraints authorized by the home, what a child needs to do to end the use of a restraint, and the way to report an inappropriate restraint. This explanation must be documented in the child's record.]~~

This 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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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER G. STANDARDS FOR HABILITATIVE AND THERAPEUTIC GROUP HOMES RESPONSIBLE TO A CHILD-PLACING AGENCY AND FOR INDEPENDENT HABILITATIVE AND THERAPEUTIC GROUP HOMES

40 TAC §§720.361, 720.363, 720.365, 720.367, 720.368, 720.370, 720.372, 720.374

The amendments are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendments implement the Human Resources Code, §42.029 and §42.042.

§720.361. Personnel-Staffing Standards for Habilitative Group Homes Responsible to a Child-Placing Agency.

(a) (No change.)

(b) The child-placing agency habilitative group home must have a psychologist available for diagnosis, treatment, and consultation.

(1) He or she must be a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act].

(2) (No change.)

§720.363. Child Care, Development, and Training Standards for Habilitative Group Homes Responsible to a Child Placing Agency.

(a)-(c) (No change.)

(d) Children's rights.

[(1)] Discipline must be consistent with the policies of the child-placing agency. There must be no cruel, harsh, unusual, or unnecessary punishment.

(1) [(A)] Only foster parents or adult caregivers can discipline children.

(2) [(B)] Children must not be subjected to verbal remarks that belittle or ridicule them or their families.

(3) [(C)] Children must not be denied food, mail, or family visits as punishment.

(4) [(D)] Children must not be threatened with the loss of foster home placement as punishment.

(5) [(E)] Any discipline [or control] must fit the needs of each child.

(6) [(F)] Children must not be punished by shaking, striking, or spanking.

(7) [(G)] A record must be kept of the imposition of restrictions to the home that exceed 24 hours.

[(2) If the agency's policies permit the use of restraint, this must be limited to emergency use of personal restraint.]

[(A) Restraining measures must not be used as punishment, as a substitute for effective treatment or program, or for the caregiver's convenience.]

[(B) If restraining measures are used, only such force as is reasonable and necessary may be used.]

[(C) If the agency authorizes the use of restraint for a child, caregivers must be trained in the type of restraint authorized before the child is placed in the agency home.]

[(D) Personal restraint may be used only when a child's behavior endangers himself or others.]

[(E) The child must be released from personal restraint as soon as he is no longer a danger to himself or others.]

[(F) Any use of personal restraint must be documented in the child's record, including:]

[(i) the date and time the caregiver began using the restraint and the name of the caregiver using it;]

[(ii) a description of the specific behaviors necessitating the use of the restraint;]

[(iii) the type of restraint used and the length of time the child was restrained; and]

[(iv) any injury the child sustained as a result of the incident or the use of restraint.]

[(G) The use of personal restraint must be evaluated as part of the next service plan review. The agency must consider alternative strategies to handle the behavior that required using personal restraint. This evaluation and instructions to caregivers concerning alternative strategies must be documented in the child's record.]

[(H) Except as permitted in Subchapter S of this chapter (relating to Standards for Child Care Facilities Serving Children with Autistic-like Behavior), mechanical restraints, seclusion, or placing a child in a locked room must not be used in an agency home. Protective devices may only be used when prescribed by a physician.]

(e) (No change.)

§720.365. Personnel Standards for Therapeutic Group Homes Responsible to a Child-Placing Agency.

(a) Staffing. The child-placing agency therapeutic group home must provide staff necessary to ensure the proper care, treatment, and safety of the residents.

(1) (No change.)

(2) The child-placing agency therapeutic group home must arrange to obtain services of a professional consultant team which has responsibility for supervising and reviewing the needs and treatment of residents. Documentation of the services provided by these professionals and the frequency of service shall be made. This professional team must include: a licensed physician who is a psychiatrist or a physician who specializes in children with psychiatric disorders; a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act]; and a social worker with a master's degree in social work from a school accredited by the Council of Social Work Education.

(b) (No change.)

§720.367. Child Care, Development, and Training Standards for Therapeutic Group Homes Responsible to a Child-Placing Agency.

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

(c) Residents' rights.

[(1)] Discipline must be consistent with the policies of the child-placing agency. There must be no cruel, harsh, unusual, or unnecessary punishment.

(1) [(A)] Only foster parents or adult caregivers can discipline residents.

(2) [(B)] Residents must not be subjected to verbal remarks that belittle or ridicule them or their families.

(3) [(C)] Residents must not be denied food, mail, or family visits as punishment.

(4) [(D)] Residents must not be threatened with the loss of foster home placement as punishment. Potential moving to a more restrictive setting must be presented as an opportunity for healthier growth.

(5) [(E)] Any discipline [or control] must fit the needs of each resident.

(6) [(F)] Residents must not be punished by shaking, striking, or spanking.

(7) [(G)] A record must be kept of the imposition of restrictions to the home that exceed 24 hours.

[(2) If the agency's policies permit the use of restraint, this must be limited to emergency use of personal restraint.]

[(A) Restraining measures must not be used as punishment, as a substitute for effective treatment or program, or for the caregiver's convenience.]

[(B) If restraining measures are used, only such force as is reasonable and necessary may be used.]

[(C) If the agency authorizes the use of restraint for a child, caregivers must be trained in the type of restraint authorized before the child is placed in the agency home.]

[(D) Personal restraint may be used only when a child's behavior endangers himself or others.]

[(E) The child must be released from personal restraint as soon as he is no longer a danger to himself or others.]

[(F) Any use of personal restraint must be documented in the child's record, including:]

[(i) the date and time the caregiver began using the restraint and the name of the caregiver using it;]

[(ii) a description of the specific behaviors necessitating the use of the restraint;]

[(iii) the type of restraint used and the length of time the child was restrained; and]

[(iv) any injury the child sustained as a result of the incident or the use of restraint.]

[(G) The use of personal restraint must be evaluated as part of the next service plan review. The agency must consider alternative strategies to handle the behavior that required using personal restraint. This evaluation and instructions to caregivers concerning alternative strategies must be documented in the child's record.]

[(H) Except as permitted in Subchapter S of this chapter (relating to Standards for Child Care Facilities Serving Children with Autistic-like Behavior), mechanical restraints, seclusion, or placing a child in a locked room must not be used in an agency home. Protective devices may only be used when prescribed by a physician.]

(d) (No change.)

§720.368. Personnel-Staffing Standards for Independent Habilitative Group Homes.

(a) (No change.)

(b) The independent habilitative group home must have a psychologist available for diagnosis, treatment, and consultation.

(1) He or she must be a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act].

(2) (No change.)

§720.370. Child Care, Development, and Training Standards for Independent Habilitative Group Homes.

(a)-(c) (No change.)

(d) Children's rights.

[(1)] The independent habilitative group home must have written policies regarding methods used for [control and] discipline of children. The policies must be available to appropriate staff. The home must also provide written information to the parents or managing conservators that identifies the person or office that parents or managing conservators can contact if they feel their children's rights have been violated. Copies of the discipline policy shall be submitted to the department with each application for a license and at any time a change is made in the policy. Discipline must be consistent with the policies of the home and must not be physically or emotionally damaging.

(1) [(A)] Only foster parents or adult caregivers can discipline children.

(2) [(B)] Children must not be subjected to cruel, harsh, unusual, or unnecessary punishment.

(3) [(C)] A record must be kept of the imposition of restrictions to the home that exceed 24 hours.

(4) [(D)] Children must not be subjected to verbal remarks that belittle or ridicule them or their families.

(5) [(E)] Children must not be denied food, mail, or family visits as punishment.

(6) [(F)] Children must not be threatened with the loss of foster home placement as punishment.

(7) [(G)] Any discipline [or control] must fit the needs of each child.

(8) [(H)] Children must not be punished by shaking, striking, or spanking.

[(2) If the facility's policies permit the use of restraint, this must be limited to emergency use of personal restraint.]

[(A) Restraining measures must not be used as punishment, as a substitute for effective treatment or program, or for the caregiver's convenience.]

[(B) If restraining measures are used, only such force as is reasonable and necessary may be used.]

[(C) Personal restraint may be used only when a child's behavior endangers himself or others.]

[(D) The child must be released from personal restraint as soon as he is no longer a danger to himself or others.]

[(E) Any use of personal restraint must be documented in the child's record, including:]

[(i) the date and time the caregiver began using the restraint and the name of the caregiver using it;]

[(ii) a description of the specific behaviors necessitating the use of the restraint;]

[(iii) the type of restraint used and the length of time the child was restrained; and]

[(iv) any injury the child sustained as a result of the incident or the use of restraint.]

[(F) The use of personal restraint must be evaluated as part of the next service plan review. The facility must consider alternative strategies to handle the behavior that required using personal restraint. This evaluation and instructions to caregivers concerning alternative strategies must be documented in the child's record.]

[(G) Except as permitted in Subchapter S of this chapter, (relating to Standards for Child Care Facilities Serving Children with Autistic-like Behavior), mechanical restraints, seclusion, or placing a child in a locked room must not be used in a foster group home. Protective devices may only be used when prescribed by a physician.]

(e) (No change.)

§720.372. Personnel Standards for Independent Therapeutic Group Homes.

(a) Staffing. The independent therapeutic group home must provide staff necessary to ensure the proper care, treatment, and safety of the residents.

(1) (No change.)

(2) The independent therapeutic group home must arrange to obtain services of a professional consultant team which has responsibility for supervising and reviewing the needs and treatment of residents. Documentation of the services provided by these professionals and the frequency of services shall be made. This professional team must include: a licensed physician who is psychiatrist or a physician who specializes in children with psychiatric disorders; a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [~~as defined by the Psychologists' Certification and Licensing Act~~]; and a social worker with a master's degree in social work from a school accredited by the Council of Social Work Education.

(b) (No change.)

§720.374. Child Care, Development, and Training Standards for Independent Therapeutic Group Homes.

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

(c) Residents' rights.

[~~(1)~~] The independent therapeutic group home must have written policies regarding methods used for [~~control and~~] discipline of children. The policies must be available to appropriate staff. The home must also provide written information to the parents or managing conservators that identifies the person or office that parents or managing conservators can contact if they feel their children's rights have been violated. Copies of the home's discipline policy must be submitted to the department with each application for a license and resubmitted at any time a change is made in policy. Discipline must be consistent with the policies of the home and cannot be physically or emotionally damaging.

(1) [~~(A)~~] Only foster parents or adult caregivers can discipline residents.

(2) [~~(B)~~] Residents must not be subjected to cruel, severe, unusual, or unnecessary punishment.

(3) [~~(C)~~] A record must be kept of the imposition of restrictions to the home that exceed 24 hours.

(4) [~~(D)~~] Residents must not be subjected to verbal remarks that belittle or ridicule them or their families.

(5) [~~(E)~~] Residents must not be denied food, mail, or family visits as punishment.

(6) [~~(F)~~] Residents must not be threatened with the loss of foster home placement as punishment. Potential moving to a more restrictive setting must be presented as an opportunity for healthier growth.

(7) [~~(G)~~] Any discipline [~~or control~~] must fit the needs of each resident.

(8) [~~(H)~~] Residents must not be punished by shaking, striking, or spanking.

[~~(2) If the facility's policies permit the use of restraint, this must be limited to emergency use of personal restraint.~~]

[~~(A) Restraining measures must not be used as punishment, as a substitute for effective treatment or program, or for the caregiver's convenience.~~]

[~~(B) If restraining measures are used, only such force as is reasonable and necessary may be used.~~]

[~~(C) Personal restraint may be used only when a child's behavior endangers himself or others.~~]

[~~(D) The child must be released from personal restraint as soon as he is no longer a danger to himself or others.~~]

[~~(E) Any use of personal restraint must be documented in the child's record, including:~~]

~~*(i)* the date and time the caregiver began using the restraint and the name of the caregiver using it;~~]

~~*(ii)* a description of the specific behaviors necessitating the use of the restraint;~~]

~~*(iii)* the type of restraint used and the length of time the child was restrained; and~~]

~~*(iv)* any injury the child sustained as a result of the incident or the use of restraint.~~]

[~~(F) The use of personal restraint must be evaluated as part of the next service plan review. The facility must consider alternative strategies to handle the behavior that required using personal restraint. This evaluation and instructions to caregivers concerning alternative strategies must be documented in the child's record.~~]

[~~(G) Except as permitted in Subchapter S of this chapter, (relating to Standards for Child Care Facilities Serving Children with Autistic-like Behavior), mechanical restraints, seclusion, or placing a child in a locked room must not be used in a foster group home. Protective devices may only be used when prescribed by a physician.~~]

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101738
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
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SUBCHAPTER H. CONSOLIDATED STANDARDS FOR 24-HOUR CARE FACILITIES

40 TAC §§720.420, 720.423, 720.440, 720.501, 720.506, 720.508, 720.520, 720.523, 720.530, 720.540, 720.550, 720.570

The amendments are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendments implement the Human Resources Code, §42.029 and §42.042.

§720.420. Plan of Service.

(a) The requirements in this section do not apply to residential treatment centers. Residential treatment centers must meet the requirements for a treatment plan in §§720.520 - 720.530 and

§§720.535 - 720.537 [§§720.520-720.537] of this title (relating to Program Director and Admission Staff-Residential Treatment Centers; Other Professional Staff-Residential Treatment Centers; Staff-Child Ratio-Residential Treatment Centers; Training-Residential Treatment Centers; Admission Policies-Residential Treatment Centers; Admission Procedures-Residential Treatment Centers; Emergency Admission-Residential Treatment Centers; Preliminary Treatment Plan-Residential Treatment Centers; Treatment Plan-Residential Treatment Centers; Treatment Plan Review-Residential Treatment Centers; Problem Management-Residential Treatment Centers; [Restraining Measures-Residential Treatment Centers; Protective Devices-Residential Treatment Centers; Mechanical Restraint-Residential Treatment Centers; Seclusion-Residential Treatment Centers;] Child Care-Residential Treatment Centers; Health and Safety-Residential Treatment Centers; and Environment-Residential Treatment Centers).

(b)-(e) (No change.)

§720.423. Problem Management.

(a) The facility must have current written policies and procedures to guide staff in disciplining [and controlling] children. Measures for positive responses to appropriate behavior must be included. A copy of the policies and procedures must be submitted to licensing with the initial application and when changes are made.

(b)-(g) (No change.)

§720.440. Program Staff--Institutions Providing Basic Child Care.

The person responsible for the admission assessment, the plan of service, and the plan of service updates must meet one of the following qualifications:

(1) a master's degree in social work from an accredited college or university or state licensure [certification] as a licensed master [certified] social worker (LMSW) and at least one year of experience in children's or family services;

(2) (No change.)

(3) a bachelor's degree in social work from an accredited college or university or state licensure [certification] as a licensed social worker (LSW) and at least two years of experience in children's or family services;

(4)-(6) (No change.)

§720.501. Program Staff--Institutions Serving Mentally Retarded Children.

(a) The person responsible for developing the admission assessment, the plan of service, and the plan of service updates must meet one of the following qualifications:

(1) a master's degree in social work from an accredited college or university or state licensure [certification] as a licensed master [certified] social worker (LMSW) and at least one year of experience in children's or family services;

(2) (No change.)

(3) a bachelor's degree in social work from an accredited college or university or state licensure [certification] as a licensed social worker (LSW) and at least two years of experience in children's or family services;

(4)-(6) (No change.)

(b) A psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act] must be available for diagnosis, treatment, and consultation. If the psychologist is not on the institution's staff, the institution must document that his services are available on at least a continuing consulting basis.

§720.506. Plan of Service--Institutions Serving Mentally Retarded Children.

(a) A psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologist's Certification and Licensing Act] must determine the need and frequency for re-evaluation of each child's intellectual functioning. The evaluation and recommendations must be documented in the child's record.

(b)-(d) (No change.)

§720.508. Problem Management--Institutions Serving Mentally Retarded Children.

[(a)] No type of physical punishment may be inflicted in any manner upon any part of a child's body.

[(b) The facility must have current written policies and procedures for using any form of restraint.]

§720.520. Program Director and Admission Assessment Staff--Residential Treatment Centers.

(a) The person responsible for the overall treatment program must be full-time staff with at least the following minimum qualifications:

(1) a master's degree in a mental health field from an accredited college or university or licensure by the Texas State Social Work Board of Examiners [certification by the Texas Department of Human Services (DHS)] as a licensed master [certified] social worker (LMSW); and

(2) (No change.)

(b) Staff responsible for evaluating potential admissions on the basis of data collected as part of the admission assessment must have at least the following minimum qualifications:

(1) a master's degree in a mental health field from an accredited college or university or licensure by the Texas State Social Work Board of Examiners [certification by DHS] as a licensed master [certified] social worker (LMSW); and

(2) (No change.)

(c) (No change.)

(d) Staff responsible for developing a preliminary treatment plan for each child must have at least the following minimum qualifications:

(1) a master's degree in a mental health field from an accredited college or university or licensure by the Texas State Social Work Board of Examiners [certification by DHS] as a licensed master [certified] social worker (LMSW); and

(2) (No change.)

§720.523. Training--Residential Treatment Centers.

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

(c) Training must include information on the center's treatment methods and [,] program[, and behavior management].

§720.530. Problem Management--Residential Treatment Centers.

[(a)] No type of physical punishment may be inflicted in any manner upon any part of a child's body.

[(b) The facility must have current written policies and procedures for using seclusion or any form of restraint.]

§720.540. Program Staff--Halfway Houses.

(a) The person responsible for developing the admission assessment, the plan of service, and plan of service updates must meet one of the following qualifications:

(1) a master's degree in social work from an accredited college or university or state licensure [~~certification~~] as a licensed master [~~certified~~] social worker (LMSW) and at least one year of experience in children's or family services;

(2) (No change.)

(3) a bachelor's degree in social work from an accredited college or university or state licensure [~~certification~~] as a licensed social worker (LSW) and at least two years of experience in children's or family services;

(4)-(6) (No change.)

(b) (No change.)

(c) Persons responsible for educational and vocational testing of children in care must have at least one of the following qualifications:

(1) designation as a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [~~as defined by the Psychologists' Certification and Licensing Act~~];

(2) (No change.)

§720.550. Program Staff--Therapeutic Camps.

Staff responsible for developing the admission assessment, the comprehensive plan of service, and plan of service updates must meet at least one of the following qualifications:

(1) a master's degree in social work from an accredited college or university or state licensure [~~certification~~] as a licensed master [~~certified~~] social worker (LSMW) and at least one year of experience in children's or family services;

(2) (No change.)

(3) a bachelor's degree in social work from an accredited college or university or state licensure [~~certification~~] as a licensed social worker (LSW) and at least two years of experience in children's or family services;

(4)-(6) (No change.)

§720.570. Definitions.

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

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

[~~(4) Behavior endangering self or others--Behavior capable of causing physical harm to self or others; may include running away; physical holding may be used to prevent a child from running away because it is directly linked to protecting him from potential injury; may include destruction of property; however, physical holding to prevent destruction of property is permitted only after less restrictive interventions have been attempted and failed. Attempts to use less restrictive interventions must be documented in the child's record as part of documenting the need for restraint if destruction of property is defined as behavior endangering self or others.~~]

[~~(5) Child care facility--A facility providing care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the facility's owner or operator for all or part of the 24-hour day whether or not the facility is operated for profit and whether or not the facility charges for its service.~~]

(4) [~~(6)~~] Children's or family services--Services designed to:

(A) support or reinforce the ability of parents to meet children's needs;

(B) supplement the care children receive from parents or to compensate for certain inadequacies in parental care; and

(C) substitute for parental care either in whole or in part.

(5) [~~(7)~~] Emergency admission--An emergency exists if:

(A) a child is in danger;

(B) a child is a danger to others; or

(C) a child is abandoned and does not have a place to stay.

(6) [~~(8)~~] External drug--A drug that, if administered orally or by injection, may harm or kill the patient.

(7) [~~(9)~~] First aid supplies--Required supplies include multisize adhesive bandages, gauze pads, tweezers, cotton balls, hydrogen peroxide, syrup of ipecac, and a thermometer.

(8) [~~(10)~~] Full-time--At least 30 hours per week.

(9) [~~(11)~~] Governing body--The entity with ultimate authority and responsibility for the facility's overall operation. All governing bodies are one of the following types:

(A) sole proprietorship--Personal ownership with the legal right and responsibility to possess, operate, sell, and otherwise deal with the facility; may include a facility owned in common by husband and wife;

(B) partnership--A combination by contract of two or more people who use their money, labor, and skill to carry on a continuing business, dividing the profits and sharing the losses in an agreed manner; includes general and limited partnerships;

(C) corporation--An intangible entity created by individuals to operate for profit but to limit individual liability; organized according to the Texas Business Corporation Act or similar act of another state as evidenced by its articles of incorporation;

(D) nonprofit corporation--The equivalent of not for profit corporation. None of the income is distributed to members, directors, or officers; organized under the Texas Nonprofit Corporation Act or similar act of another state;

(E) nonprofit corporation with religious affiliation--An entity with nonprofit corporation status operated by, responsible to, or associated with an organization of individuals devoted to religious purposes; those whose relation with a religious organization is only for business, such as those who only lease space, are not included;

(F) association--A combination of individuals and interests of some kind without IRS tax-exempt status; not organized under the Texas Business Corporation Act;

(G) nonprofit association--A combination of individuals and interests of some kind, synonymous with society, with operations devoted to charitable, benevolent, religious, patriotic, or educational purposes; not organized under the Texas Business Corporation Act;

(H) nonprofit association with religious affiliation--A combination of individuals and interests of some kind, synonymous with society, with operations devoted to religious purposes; not organized under the Texas Business Corporation Act; operated by, responsible to, or associated with an organization of individuals devoted to

religious purposes. Those whose relationship with a religious organization is only for business, such as those who only lease space, are not included.

(10) [~~(12)~~] Hospital--Refers only to a licensed or accredited facility.

(11) [~~(13)~~] Legend drug--A drug that bears the following caution on its label: "Federal law prohibits dispensing without a prescription." A prescription from a licensed physician is required for purchase.

(12) [~~(14)~~] Living unit--A building or part of a building where a group of children live.

[~~(15) Mechanical restraint--Any physical device used to restrict the movement of the whole or a portion of a child's body, except when such restriction is primarily used to prevent self-injury or permit wounds to heal.~~]

(13) [~~(16)~~] Mental health field--A major field of study focusing on normal and abnormal human development and personal and interpersonal relationship skills. A degree in a mental health field must be from an accredited college or university and include a clinical internship or field placement.

(14) [~~(17)~~] Mobile nonambulatory--The inability to walk without assistance, but ability to move from place to place using devices such as walkers, crutches, wheel chairs, wheeled platforms, and so on.

(15) [~~(18)~~] Neglect--Nonaccidental failure or threatened failure to provide a child with the physical and emotional requirements for life, growth, and development.

(16) [~~(19)~~] New facility--A child care facility that is not yet in operation.

(17) [~~(20)~~] Nonambulatory--The inability to walk independently and without assistance; applies to both mobile nonambulatory and nonmobile individuals.

(18) [~~(21)~~] Nonmobile--The inability to move from place to place.

(19) [~~(22)~~] Nonlegend drug--A drug that does not require a prescription from a licensed practitioner for purchase; may also be called an over-the-counter (OTC) drug. A written prescription for a nonlegend drug does not make the drug legend.

(20) [~~(23)~~] Normalization principle--The principle of helping the developmentally disabled to live as normally as possible; making available to them patterns and conditions of everyday life that are as close as possible to the norms and patterns of the mainstream of society; specifically, the use of means that are as culturally normative as possible to elicit and maintain behavior that is as culturally normative as possible.

[~~(24) Personal restraint--Any contact of a staff member's body to restrict the movement of the whole or a portion of a child's body.~~]

(21) [~~(25)~~] Physician--A person registered and licensed under the Medical Practice Act or practicing on a United States Military Installation.

(22) [~~(26)~~] Professional staff--People include:

(A) psychiatrist--a licensed physician with advanced training in the diagnosis and treatment of mental and emotional disorders;

(B) psychologist--a person licensed as set forth in the Texas Occupations Code, Chapter 501 [~~qualified according to the Psychologists' Certification and Licensing Act~~];

(C) social worker--a person licensed [~~certified~~] by the Texas State Social Work Board of Examiners [~~department~~] as a [~~certified~~] social worker;

(D) person qualified to provide social work services--a person with a master's degree in social work from an accredited college or university; and

(E) professional counselors licensed by the Texas State Board of Examiners of Professional Counselors [~~Department of Health~~]. Other professional staff in fields such as nursing, special education, vocational counseling, and so on may be included in the professional staffing plan for residential treatment centers if their responsibilities are appropriate to the scope of the facility's program description. These professionals must have the minimum qualifications generally recognized in their area of specialization.

[~~(27) Protective device--Devices used to prevent self-injury or self-mutilation.~~]

(23) [~~(28)~~] Psychologist--Psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [~~as defined by the Psychologists' Certification and Licensing Act (Texas Civil Statutes, Article 4512c)~~].

(24) [~~(29)~~] Sample drug--A drug given without charge to a licensed practitioner that may be prescribed in the treatment regimen.

(25) [~~(30)~~] Schedule II drug--A drug classified under the Dangerous Drugs and Controlled Substances Act of 1970 that has a high potential for abuse with severe psychic or physical dependence possible.

[~~(31) Seclusion--Confinement, without staff present, in a locked room or in another isolated area from which the child is prevented from exiting.~~]

(26) [~~(32)~~] Serious incident--Any nonroutine occurrence that has an impact on the care, supervision, and/or treatment of a child or children. This includes, but is not limited to, suicide attempts, injuries requiring medical treatment, runaways, commission of a crime, allegations of abuse and/or neglect, or abusive treatment.

(27) [~~(33)~~] Significantly below average intellectual functioning--Performance that is two or more standard deviations from the mean or average of the tests (usually 68 on Stanford-Binet or Cattell and 70 on the Wechsler).

(28) [~~(34)~~] Staff-child ratio--The ratio applies to the total facility and includes children of staff who live in child care units. Persons counted in the staff-child ratio must:

(A) be engaged in child care activity; and

(B) meet at least the qualifications for child care staff.

(29) [~~(35)~~] Suicide attempts--Child's attempt to take his own life using means or methods capable of causing serious injury or means or method that the child believes capable of causing serious injury.

(30) [~~(36)~~] Supervise (children)--Awareness of and responsibility for a child's ongoing activity. Supervision requires staff to have knowledge of program and children's needs and to be accountable for service delivery. The facility is responsible for providing the degree of supervision indicated by a child's age, developmental level, and physical, emotional, and social needs.

(31) [~~(37)~~] Volunteer--A person who provides services to a facility without monetary compensation, includes sponsoring families. When a child in care is invited by another child in the community to participate in family, community, church, school, or other activities, this is not considered volunteer services, and the family is not considered a sponsoring family.

(32) [~~(38)~~] Volunteer, short-term services through an organization or agency--Volunteer services provided through a church, civic, fraternal, or other organization or agency where individuals providing services have only occasional short-term contact with children in care. The facility must be aware of and approve the organization or agency's policies on volunteers who have contact with children.

(33) [~~(39)~~] Volunteer, used as child care staff--A volunteer who provides child care services to a group of children without direct supervision by paid staff and/or whose presence must be counted for the facility to meet the staff-child ratio.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101739
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

♦ ♦ ♦

40 TAC §§720.424, 720.425, 720.447, 720.509 - 720.511, 720.531 - 720.534, 720.547, 720.557

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

The repeals are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The repeals implement the Human Resources Code, §42.029 and §42.042.

§720.424. Restraining Measures.

§720.425. Personal Restraint.

§720.447. Restraining Measures: Institutions Providing Basic Child Care.

§720.509. Restraining Measures--Institutions Serving Mentally Retarded Children.

§720.510. Protective Devices--Institutions Serving Mentally Retarded Children.

§720.511. Mechanical Restraint--Institutions Serving Mentally Retarded Children.

§720.531. Restraining Measures--Residential Treatment Centers.

§720.532. Protective Devices--Residential Treatment Centers.

§720.533. Mechanical Restraint--Residential Treatment Centers.

§720.534. Seclusion--Residential Treatment Centers.

§720.547. Restraining Measures--Halfway Houses.

§720.557. Restraining Measures--Therapeutic Camps.

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

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TRD-200101740
C. Ed Davis
Deputy Director, Legal Services
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For further information, please call: (512) 438-3437

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SUBCHAPTER M. STANDARDS FOR EMERGENCY SHELTERS

40 TAC §720.916, §720.923

The amendments are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendments implement the Human Resources Code, §42.029 and §42.042.

§720.916. Children's Rights.

(a)-(l) (No change.)

[~~(m) The emergency shelter must use physical holding as a form of restraint only to protect the child from injury to himself or others. The emergency shelter must document in the child's record the use of physical holding and the length of time used. The emergency shelter must not use mechanical restraint.~~]

[~~(n) At admission, the facility must explain to children able to comprehend the information, the facility's policies and practices on the use of restraint. The explanation must include who can do a restraint, the things caregivers must first try to do to defuse the situation and avoid the use of restraint, the kinds of situations in which restraint may be used, the types of restraints authorized by the facility, what a child needs to do to end the use of a restraint, and the way to report an inappropriate restraint. This explanation must be documented in the child's record.~~]

[~~(o) The emergency shelter may place children in a locked room only until they can be taken for immediate medical treatment. The emergency shelter must document in the child's record any seclusion of a child.~~]

(m) [~~(p)~~] The emergency shelter must not allow children in care to act as or be employed as staff.

§720.923. Definitions.

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

(1)-(8) (No change.)

(9) Psychologist--Psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act].

(10)-(11) (No change.)

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

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SUBCHAPTER S. STANDARDS FOR CHILD-CARE FACILITIES SERVING CHILDREN WITH AUTISTIC-LIKE BEHAVIOR

40 TAC §§720.1503 - 720.1506

The amendments are proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendments implement the Human Resources Code, §42.029 and §42.042.

§720.1503. Admission.

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

(c) The treatment team must be responsible for the evaluation and diagnosis of each child. The team must include a licensed physician who is a psychiatrist or a physician who specializes in children with psychiatric disorders, and has at least one year of experience in working with children with pervasive developmental disorders. The team must also include at least one of the following:

(1) a psychologist licensed as set forth in the Texas Occupations Code, Chapter 501 [as defined by the Psychologists' Certification and Licensing Act]. The psychologist must have at least one year of experience in working with children with pervasive developmental disorders;

(2)-(3) (No change.)

(d) (No change.)

§720.1504. Treatment Plan.

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

(c) The facility must implement the plan as follows:

(1) (No change.)

(2) If the treatment plan includes the use of aversive procedures, [mechanical restraint, or chemical restraint,] the facility must obtain written consent for its use from the parents or managing conservator. The facility must include the written consent in the child's record.

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

(d) (No change.)

(e) The facility must schedule a conference every three months to review and update the treatment plan. The facility also must schedule a conference every time the plan is altered. The person responsible for the treatment program and the foster parents or child-care worker with primary responsibility for the care of the child must attend the conference. The facility must invite the child's parents or managing conservator to attend the conference. If the parents or managing conservator are unable to attend the conference, the facility must document the reasons in the child's record. The facility documents the names of those who attended the conference in the child's records. The facility also must:

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

(3) obtain written consent from the parents or managing conservator, if the updated plan includes initial use of aversive procedures[, mechanical restraint, or chemical restraint]; and

(4) (No change.)

(f) (No change.)

§720.1505. Behavior Therapy.

(a)-(g) (No change.)

(h) If a child is put in seclusion under §720.1011 of this title (relating to Seclusion), the child must not be placed in a dark room [If aversive procedures include the use of locked time out, children must not be placed in a locked time-out room for more than 15-minute intervals].

[(1) Children in a locked time-out room must be watched or visually monitored on a continuous basis by the foster parent or child-care worker.]

[(2) The facility must document in the child's records, the name of the person monitoring the child, and a description of the child's behavior while in a locked time-out room.]

[(3) Children must not be placed in a dark room.]

(i)-(l) (No change.)

§720.1506. Medical Therapy.

(a)-(g) (No change.)

(h) The [Unless prescribed for chemical restraint, the] facility must discontinue use of mind-altering or behavior-modifying medications if they interfere with a child's participation in his treatment plan.

[(i) Facilities must only use chemical restraints to intervene in life-threatening situations when a child's self-abusive behavior could result in permanent disability.]

[(j) The facility must ensure that children are transferred to an appropriate medical setting if their need for chemical restraint continues beyond the initial administration of the medication.]

This 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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C. Ed Davis
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Texas Department of Protective and Regulatory Services
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For further information, please call: (512) 438-3437

♦ ♦ ♦

40 TAC §720.1507

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

The repeal is proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The repeal implements the Human Resources Code, §42.029 and §42.042.

§720.1507. Mechanical Restraint.

This 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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C. Ed Davis
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♦ ♦ ♦

CHAPTER 725. GENERAL LICENSING PROCEDURES

SUBCHAPTER OO. APPEALS OF LICENSING STAFF DECISIONS

40 TAC §725.4003

The Texas Department of Protective and Regulatory Services (TDPRS) proposes an amendment to §725.4003, concerning operations during appeal of denial or revocation, in its General Licensing Procedures chapter. The purpose of the amendment is to update the references to violations of standards that pose a risk to the health and safety of children to incorporate the behavior intervention rules that were effective September 1, 2000.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed section will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Fields also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that obsolete references will be deleted, and correct references will be added. There will be no effect on large, small, or micro-businesses because the section does not impose new requirements on the cost of doing business, does not require the purchase of any new equipment, and should not require any increased staff time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of the proposal may be directed to Lizet Alaniz at (512) 438- 4538 in TDPRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-167, Texas Department of Protective and Regulatory Services E-611, 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.

The amendment is proposed under the Human Resources Code (HRC), §42.029, which authorizes the department to propose and adopt rules to facilitate implementation of department programs; and HRC, §42.042, which gives the department the authority to promulgate rules to carry out the statute and to promulgate minimum standards for licensed child-care facilities and registered family homes.

The amendment implements the Human Resources Code, §§42.029 and 42.042.

§725.4003. Operations During Appeal of Denial or Revocation.

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

(c) Violations of the following standards pose a risk to the health and safety of children:

(1)-(6) (No change.)

(7) Child-Placing Agencies.

(A)-(B) (No change.)

(C) §720.31(a)(2)-(3), (b)-(e), and (g) [~~§720.31(a)(2)(B)-(C), (3)-(5) and (8), and (b)(1)-(6) and (8)-(9)~~] of this title (relating to Problem Management);

(D)-(W) (No change.)

(8) Agency Homes.

(A)-(B) (No change.)

(C) §720.120(c) [~~, (d), and (e)(2)~~] of this title (relating to Children's Rights);

(D)-(H) (No change.)

(9) Habilitative and Therapeutic Agency Homes.

(A) (No change.)

(B) §720.133(c)(1), (d)(1)-(6), and (e)(2) [~~§720.133(c)(1), (d)(1)(A)-(F) and (2) and (e)(2)~~] of this title (relating to Child Care, Development, and Training Standards for Habilitative Agency Homes);

(C)-(D) (No change.)

(E) §720.137(c)(1)-(5) and (7), and (d) [~~§720.137(c)(1)(A)-(E) and (G) and (2) and (d)~~] of this title (relating to Child Care, Development, and Training Standards for Therapeutic Agency Homes).

(10) Habilitative and Therapeutic Family Homes.

(A) (No change.)

(B) §720.203(c)(1), (d)(1)-(2), (4)-(6), and (8), and (e)(2) [~~§720.203(c)(1), (d)(1)(A), (B), (D)-(F), (H), (2), and (e)(2)~~] of this title (relating to Child Care, Development, and Training Standards for Habilitative Family Homes);

(C)-(D) (No change.)

(E) §720.207(c)(1)-(2), (4)-(6), and (8), and (d) [~~§720.207(c)(1)(A)-(B), (D)-(F), (H), (2)-(3), and (d)~~] of this title (relating to Child Care, Development, and Training Standards for Therapeutic Family Homes).

(11) Foster Family Homes.

(A)-(D) (No change.)

(E) §720.243(h)(1), (2), (4), (5), and (8)-(10) [~~, (i), and (j)~~] of this title (relating to Children's Rights and Privileges);

(F)-(I) (No change.)

(12) Foster Group Homes.

(A)-(B) (No change.)

(C) §720.305 (f)-(g) [~~§720.305(f)-(h)~~] of this title (relating to Children's Rights and Privileges);

(D)-(N) (No change.)

(O) §720.326(l)(1)-(2), (4)-(5) and (7)-(9) [~~, and (m)-(n)~~] of this title (relating to Children's Rights and Privileges in an Independent Foster Group Home);

(P)-(U) (No change.)

(13) Habilitative and Therapeutic Group Homes Responsible to a Child-Placing Agency and for Independent Habilitative and Therapeutic Group Homes.

(A) (No change.)

(B) §720.370(c)(1), (d)(1)-(6), and (8), and (e)(2) [~~§720.370(c)(1), (d)(1)(A)-(F) and (H), (d)(2), and (e)(2)~~] of this title (relating to Child Care, Development, and Training Standards for Independent Habilitative Group Homes);

(C)-(D) (No change.)

(E) §720.374(c)(1)-(2), (4)-(6), and (8) [~~§720.374(c)(1)(A)-(B), (D)-(F), (H), and (c)(2)~~] of this title (relating to Child Care, Development, and Training Standards for Independent Therapeutic Group Homes).

(14) 24-Hour Care Facilities.

(A)-(J) (No change.)

~~[(K) §720.424 of this title (relating to Restraining Measures);]~~

~~[(L) §720.425(a)-(c) of this title (relating to Personal Restraint);]~~

(K) [~~(M)~~] §720.426(a) of this title (relating to Child Care);

(L) [~~(N)~~] §720.427(a)-(d), (f), (h), (k), (l)(1), (p), (q), and (r)(2) of this title (relating to Medical and Dental Care);

(M) [~~(O)~~] §720.428(a) and (e) of this title (relating to Nutrition);

(N) [~~(P)~~] §720.429(a) and (c)-(f) of this title (relating to Health and Safety);

(O) [~~(Q)~~] §720.430(b)-(d) of this title (relating to Environment);

(P) [~~(R)~~] §720.431 of this title (relating to Transportation);

(Q) [~~(S)~~] §720.432(b) of this title (relating to Food Preparation, Storage, and Equipment);

(R) [~~(T)~~] §720.441 of this title (relating to Staff-Child Ratio-Institutions Providing Basic Child Care);

(S) [~~(U)~~] §720.446(a), (d), and (e) of this title (relating to Problem Management: Institutions Providing Basic Child Care);

~~[(V) §720.447 of this title (relating to Restraining Measures: Institutions Providing Basic Child Care);]~~

(T) [~~(W)~~] §720.449 of this title (relating to Environment - Institutions Providing Basic Child Care);

(U) [~~(X)~~] §720.502 of this title (relating to Staff-Child Ratio - Institutions Serving Mentally Retarded Children);

(V) [~~(Y)~~] §720.508 of this title (relating to Problem Management - Institutions Serving Mentally Retarded Children);

~~[(Z) §720.509 of this title (relating to Restraining Measures - Institutions Serving Mentally Retarded Children);]~~

~~[(AA) §720.510 of this title (relating to Protective Devices - Institutions Serving Mentally Retarded Children);]~~

~~[(BB) §720.511(a)-(d) of this title (relating to Mechanical Restraint - Institutions Serving Mentally Retarded Children);]~~

(W) [~~(CC)~~] §720.514 of this title (relating to Health and Safety - Institutions Serving Mentally Retarded Children);

(X) [~~(DD)~~] §720.515(c) of this title (relating to Environment - Institutions Serving Mentally Retarded Children);

(Y) [~~(EE)~~] §720.522 of this title (relating to Staff Child Ratio - Residential Treatment Centers);

(Z) [~~(FF)~~] §720.523(a) and (c) of this title (relating to Training - Residential Treatment Centers);

(AA) [~~(GG)~~] §720.530 of this title (relating to Problem Management - Residential Treatment Centers);

~~[(HH) §720.531 of this title (relating to Restraining Measures - Residential Treatment Centers);]~~

~~[(II) §720.532 of this title (relating to Protective Devices - Residential Treatment Centers);]~~

~~[(JJ) §720.533(a)-(d) of this title (relating to Mechanical Restraint - Residential Treatment Centers);]~~

~~[(KK) §720.534 of this title (relating to Seclusion - Residential Treatment Centers);]~~

(BB) [~~(LL)~~] §720.536 of this title (relating to Health and Safety - Residential Treatment Centers);

(CC) [~~(MM)~~] §720.537 of this title (relating to Environment - Residential Treatment Centers);

(DD) [~~(NN)~~] §720.541 of this title (relating to Staff-Child Ratio - Halfway Houses);

(EE) [~~(OO)~~] §720.546 of this title (relating to Problem Management - Halfway Houses);

~~[(PP) §720.547 of this title (relating to Restraining Measures - Halfway Houses);]~~

(FF) [~~(QQ)~~] §720.549(b) of this title (relating to Environment - Halfway Houses);

(GG) [~~(RR)~~] §720.551 of this title (relating to Staff-Child Ratio - Therapeutic Camps);

(HH) [~~(SS)~~] §720.556 of this title (relating to Problem Management - Therapeutic Camps);

~~[(TT) §720.557 of this title (relating to Restraining Measures - Therapeutic Camps);]~~

(II) [~~(UU)~~] §720.559(a)-(b) of this title (relating to Medical and Dental Care - Therapeutic Camps);

(JJ) ~~[~~(VV)] §720.560 of this title (relating to Environment - Therapeutic Camps);

(KK) ~~[~~(WW)] §720.571(a), (f), and (g) of this title (relating to Facilities Providing Care for Children and Adults);

(LL) ~~[~~(XX)] §720.572 of this title (relating to Texas Department of Health - Minimum Standards of Environmental Health for Texas Department of Protective and Regulatory Services Licensed Therapeutic Camps - Permanent Camps);

(MM) ~~[~~(YY)] §720.573 of this title (relating to Texas Department of Health - Minimum Standards of Environmental Health for Texas Department of Protective and Regulatory Services Licensed Therapeutic Camps - Primitive or Wilderness Camps);

(NN) ~~[~~(ZZ)] §720.574 of this title (relating to Additional Minimum Standards for Institutions Serving Mentally Retarded Children with Primary Medical Needs).

(15) Emergency Shelters.

(A)-(I) (No change.)

(J) §720.916(l)(1)-(3) and (5)-(9) [~~, (m), and (n)~~] of this title (relating to Children's Rights);

(K)-(O) (No change.)

(16) Residential Child-Care Facilities, Child-Placing Agencies, and Agency Homes.

(A) §720.1004(b) of this title (relating to Less Restrictive Behavior Interventions);

(B) §720.1005 of this title (relating to Restraint and Seclusion: General Requirements);

(C) §720.1006 of this title (relating to Emergency Medication);

(D) §720.1007 of this title (relating to Personal Restraint);

(E) §720.1008 of this title (relating to Mechanical Restraint);

(F) §720.1009 of this title (relating to Protective Devices);

(G) §720.1010 of this title (relating to Supportive Devices);

(H) §720.1011 of this title (relating to Seclusion);

(I) §720.1012(b)-(d) if this title (relating to Behavior Intervention Training);

(J) §720.1013 of this title (relating to Evaluation of Behavior Interventions).

(17) [~~(16)~~] Child-Care Facilities Serving Children with Autistic-like Behavior.

(A) §720.1501(a) and (c) of this title (relating to Staffing);

(B) §720.1502(b) of this title (relating to Training);

(C) §720.1504(c)(2) of this title (relating to Treatment Plan);

(D) §720.1505(a)-(c), (d)(1)-(2), and (f)-(k) [~~§720.1505(a)-(c), (d)(1)-(2), (f), (g), (h)(1) and (3), and (i)-(l)~~] of this title (relating to Behavior Therapy);

(E) §720.1506 of this title (relating to Medical Therapy).[~~;~~]

~~[(F) §720.1507(a)-(d), (e)(1)-(4), and (f)-(k) of this title (relating to Mechanical Restraint).]~~

This 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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C. Ed Davis
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SUBCHAPTER KKK. ADOPTIVE HOME SCREENING

40 TAC §725.6070

The Texas Department of Protective and Regulatory Services (TDPRS) proposes an amendment to §725.6070, concerning adoptive home screening requirements, in its General Licensing Procedures chapter. The purpose of the amendment is to delete the paragraph of the rule that conflicts with the Multi-Ethnic Placement Act of 1994 (MEPA), as amended (42 USC 622), and with the Removal of Barriers to Interethnic Adoption provisions of 1996 (IEP) (§1808, PL 104-188). This federal legislation prohibits a child-placing agency, when making a foster or adoptive placement, from considering the race, color or national origin of the child or of the foster or adoptive parents, in almost all circumstances. Child-placing agencies are also prohibited from considering the capacity of prospective foster or adoptive parents to meet the needs of a child relating to race, color or national origin, in almost all circumstances.

Mary Fields, Budget and Federal Funds Director, has determined that for the first five-year period the proposed section will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Fields also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be that the rule will comply with federal laws. There will be no effect on large, small, or micro-businesses because the rule does not impose new requirements on the cost of doing business, does not require the purchase of any new equipment, and should not require any increased staff

time in order to comply. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of the proposal may be directed to Lizet Alaniz at (512) 438- 4538 in TDPRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-168, Texas Department of Protective and Regulatory Services E-611, 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.

The amendment is proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of department programs.

The amendment implements the Human Resources Code, §40.029, the Multi-Ethnic Placement Act of 1994 (MEPA), as amended (42 USC 622) and the Removal of Barriers to Interethnic Adoption provisions of 1996 (§1808, PL 104-188) (IEP).

§725.6070. Adoptive Home Screening Requirements.

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

(c) An adoptive home screening must include all available information about the adoptive applicants regarding the following:

(1)-(8) (No change.)

~~[(9) sensitivity to, and feelings about, different socioeconomic, cultural, and ethnic groups in relation to the family's ability to provide an adoptive home and to maintain the cultural or ethnic identity of a child from a different background;]~~

(9) [~~(10)~~] expectations of, and plans for, adoptive children;

(10) [~~(11)~~] behavior, background, special needs status or other characteristics of a potential adoptive child that the family cannot accept; and

(11) [~~(12)~~] financial status and ability to support a child, including employment history and insurance coverage.

(d) (No change.)

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

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C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
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CHAPTER 732. CONTRACTED SERVICES
SUBCHAPTER A. GENERAL PROCEDURES

40 TAC §§732.101, 732.103, 732.105, 732.107, 732.109, 732.111, 732.113, 732.115

The Texas Department of Protective and Regulatory Services (TDPRS) proposes new §§732.101, 732.103, 732.105, 732.107, 732.109, 732.111, 732.113, and 732.115, concerning general procedures, in its Contracted Services chapter. The purpose of the new sections is to incorporate new Health and Human Services Commission (HHSC) contracting rules into this chapter. The new sections are proposed in new Subchapter A, General Procedures.

Mary Fields, Budget and Federal Funds Director, 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 government as a result of enforcing or administering the sections.

Ms. Fields also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to ensure that the rules comply with the HHSC rules. There will be no effect on large, small, or micro-businesses because the rules do not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Ron Curry at (512) 833- 3405 in TDPRS's Contract Administration Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-171, Texas Department of Protective and Regulatory Services E-611, 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.

The new sections are proposed under the Human Resources Code (HRC), §40.029, which authorizes the department to adopt rules to facilitate implementation of departmental programs.

The new sections facilitate the implementation of all programs of the department. Child Protective Services, Adult Protective Services, Child Care Licensing, and Prevention and Early Intervention all use contracted goods and services to serve the needs of the agency and of the clients of the agency.

§732.101. What is the purpose of this chapter?

This chapter provides procedures and criteria to govern the purchase of goods and services and the management of contracts by this Department that are efficient, economical, and achieve the objectives of the Department.

§732.103. How are the terms in this chapter defined?

The words and terms in this chapter have the following meanings, unless the context clearly indicates otherwise:

(1) Department - The Texas Department of Protective and Regulatory Services.

(2) Executive Director - The director of the Department.

§732.105. Are all contracting procedures and criteria contained in this chapter?

(a) Federal and State statutes and regulations control many aspects of purchasing and contract management. The Department and all other parties must comply with them when they are applicable.

(b) The Health and Human Services Commission has adopted rules at 1 TAC Chapter 391 (relating to Purchase of Goods and Services by Health and Human Services Agencies). Those rules apply to the purchase of goods and services by this Department, whether for administrative or client use or benefit. The rules in 1 TAC Chapter 391 (relating to Purchase of Goods and Services by Health and Human Services Agencies) govern to the extent of any conflict with a procedure or requirement prescribed by another state agency other than a rule relating to:

(1) historically underutilized businesses; or

(2) the purchase of goods or services from persons with disabilities.

(c) The rules of the Health and Human Services Commission do not apply to the following transactions:

(1) the lease, purchase, or lease-purchase of real property;

(2) the award of grants; or

(3) interstate or international agreements executed in accordance with applicable law.

(d) Other rules of this Department provide additional procedures, criteria, and requirements concerning specific types of contracts or specific stages of the contract process. For example, Chapter 700 of this title (relating to Child Protective Services) contains additional procedures, criteria, and requirements concerning contracts for residential child care, and Chapter 730 of this title (relating to Legal Services) contains procedures, criteria, and requirements concerning hearings.

(e) The Executive Director or designee may adopt policies to guide the Department concerning contracting. The policies may interpret statutes, rules, or contract provisions; however, they do not create any new rights or responsibilities for any client or contractor unless the person agrees in writing. The Department may enforce the policies against employees and any person who has agreed to implement the policies. The Executive Director or designee may waive policies but may not waive rules.

§732.107. May the Department use all procedures, criteria, and exceptions contained in the rules of the Health and Human Services Commission?

(a) The Department may use all procedures, criteria, and exceptions contained in 1 TAC Chapter 391 (relating to Purchase of Goods and Services by Health and Human Services Agencies), concerning the purchase of goods and services unless limited by:

(1) federal statute, rule, or agreement;

(2) state statute;

(3) funding agreement;

(4) other rule or order of the Health and Human Services Commission;

(5) the rules of the Department; or

(6) policies of the Department that have not been waived.

(b) When required by 1 TAC Chapter 391 (relating to Purchase of Goods and Services by Health and Human Services Agencies), the Department must use the procedures, criteria, and exceptions in that chapter.

§732.109. How does the Department apply exceptions to its contracting rules?

Within this chapter and within other applicable statutes and rules, possible exceptions are listed. The Executive Director or designee, applying the criteria in the statute or rule, may determine whether the exception applies. Some exceptions require specific procedures and documentation. Policies may require additional procedures and documentation.

§732.111. What rules apply relating to historically underutilized businesses?

The Department will comply with the rules of the General Services Commission found at 1 TAC Chapter 111, Subchapter B (relating to the Historically Underutilized Business Program).

§732.113. What rules apply to emergency purchases?

(a) If a purchase of goods or services is required as a direct result of a bona fide emergency that constitutes an immediate threat to public or client health or safety or which creates an imminent risk of loss to the Department that is documented and justified in the procurement record, the Department may use noncompetitive procurement methods.

(b) Notwithstanding any other rule in this chapter, if the Executive Director or designee approves the designation as an emergency purchase, and if the purchase violates no other applicable statute or rule, no rule in this chapter shall prohibit the purchase.

(c) Despite the existence of a bona fide emergency, the Department will use its best efforts to conduct the procurement with as much competition as is practical under the circumstances and in as much compliance with the rules of this chapter as is practical.

§732.115. Are the rules for purchasing with federal funds different?

Generally, the Department purchases goods and services with federal funds using the same procedures, criteria, and exceptions as the Department uses with state funds. If the federal statute, regulation, or funding agreement requires different procedures, criteria, or exceptions, the Department will comply.

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

Filed with the Office of the Secretary of State, on March 23, 2001.

TRD-200101748
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: May 25, 2001
For further information, please call: (512) 438-3437

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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 1. ADMINISTRATION

PART 18. TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

CHAPTER 471. OPERATING RULES OF THE TELECOMMUNICATIONS INFRASTRUCTURE FUND BOARD

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

The Telecommunications Infrastructure Fund Board (TIFB) has withdrawn from consideration the proposed repeal of §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30 - 471.33, 471.50, 471.60, 471.70, 471.80, 471.90 - 471.92, 471.100, which appeared in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11781).

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101770
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Effective date: March 26, 2001
For further information, please call: (512) 344-4306

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

The Telecommunications Infrastructure Fund Board (TIFB) has withdrawn from consideration proposed new §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30 - 471.33, 471.50 and 471.60, which appeared in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11781).

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101771
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Effective date: March 26, 2001
For further information, please call: (512) 344-4306

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.215

The Public Utility Commission of Texas has withdrawn from consideration proposed new to §25.215 which appeared in the September 29, 2000, issue of the *Texas Register* (25 TexReg 9795).

Filed with the Office of the Secretary of State on March 23, 2001

TRD-200101679
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 23, 2001
For further information, please call: (512) 936-7308

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 229. FOOD AND DRUG

SUBCHAPTER J. MINIMUM STANDARDS FOR NARCOTIC TREATMENT PROGRAMS

25 TAC §§229.142, 229.144, 229.145, 229.147, 229.148, 229.150

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed amended section's, submitted by the Texas Department of Health has been automatically withdrawn. The new section as proposed appeared in the September 22, 2000 issue of the *Texas Register* (25 TexReg 9400).

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101703

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25 TAC §229.148

Pursuant to Texas Government Code, §2001.027 and 1 TAC §91.65(c)(2), the proposed repeal section, submitted by the Texas Department of Health has been automatically withdrawn. The new section as proposed appeared in the September 22, 2000 issue of the *Texas Register* (25 TexReg 9409).

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101704

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

SUBCHAPTER C. ELIGIBILITY FOR CHILD PROTECTIVE SERVICES

40 TAC §§700.337 - 700.344, 700.346 - 700.348

The Texas Department of Protective and Regulatory Services (TDPRS) has withdrawn from consideration the repeal of §§700.337 - 700.344 and 700.346 - 700.348, concerning the adoption assistance program, in its Child Protective Services chapter. The text of the proposal appeared in the December 15, 2000, issue of the *Texas Register* (25 TexReg 12327).

The effective date of the withdrawal is March 23, 2001. TDPRS is simultaneously proposing rules in this area. Those rules appear elsewhere in this issue.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101705
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: March 23, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER H. ADOPTION ASSISTANCE PROGRAM

DIVISION 1. PROGRAM DESCRIPTION AND DEFINITIONS

40 TAC §§700.801 - 701.805

The Texas Department of Protective and Regulatory Services (TDPRS) has withdrawn from consideration new §§700.801 - 700.805, concerning the adoption assistance program, in its Child Protective Services chapter. The text of the proposal appeared in the December 15, 2000, issue of the *Texas Register* (25 TexReg 12328).

The effective date of the withdrawal is March 23, 2001. TDPRS is simultaneously proposing rules in this area. Those rules appear elsewhere in this issue.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101706
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: March 23, 2001
For further information, please call: (512) 438-3437

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DIVISION 2. TITLE IV-E ELIGIBILITY REQUIREMENTS

40 TAC §§700.820 - 700.823

The Texas Department of Protective and Regulatory Services (TDPRS) has withdrawn from consideration new §§700.820 - 700.823, concerning the adoption assistance program, in its Child Protective Services chapter. The text of the proposal appeared in the December 15, 2000, issue of the *Texas Register* (25 TexReg 12329).

The effective date of the withdrawal is March 23, 2001. TDPRS is simultaneously proposing rules in this area. Those rules appear elsewhere in this issue.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101707
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: March 23, 2001
For further information, please call: (512) 438-3437

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DIVISION 3. APPLICATION PROCESS, AGREEMENTS, AND BENEFITS

40 TAC §§700.840 - 700.850

The Texas Department of Protective and Regulatory Services (TDPRS) has withdrawn from consideration new §§700.840 - 700.850, concerning the adoption assistance program, in its Child Protective Services chapter. The text of the proposal appeared in the December 15, 2000, issue of the *Texas Register* (25 TexReg 12330).

The effective date of the withdrawal is March 23, 2001. TDPRS is simultaneously proposing rules in this area. Those rules appear elsewhere in this issue.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101708
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: March 23, 2001
For further information, please call: (512) 438-3437

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DIVISION 4. CHANGES IN CIRCUMSTANCES

40 TAC §§700.860 - 700.863

The Texas Department of Protective and Regulatory Services (TDPRS) has withdrawn from consideration new §§700.860 - 700.863, concerning the adoption assistance program, in its Child Protective Services chapter. The text of the proposal appeared in the December 15, 2000, issue of the *Texas Register* (25 TexReg 12331).

The effective date of the withdrawal is March 23, 2001. TDPRS is simultaneously proposing rules in this area. Those rules appear elsewhere in this issue.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101709
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: March 23, 2001
For further information, please call: (512) 438-3437

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DIVISION 5. APPEALS AND HEARINGS

40 TAC §700.880, §700.881

The Texas Department of Protective and Regulatory Services (TDPRS) has withdrawn from consideration new §700.880 and §700.881, concerning the adoption assistance program, in its Child Protective Services chapter. The text of the proposal appeared in the December 15, 2000, issue of the *Texas Register* (25 TexReg 12332).

The effective date of the withdrawal is March 23, 2001. TDPRS is simultaneously proposing rules in this area. Those rules appear elsewhere in this issue.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101710
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: March 23, 2001
For further information, please call: (512) 438-3437

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 2. MEDICAID HOME HEALTH PROGRAM

1 TAC §355.8021

The Health and Human Services Commission (HHSC) adopts an amendment to §355.8021 concerning reimbursement methodology for home health services without changes to the proposed text published in the January 5, 2001, issue of the *Texas Register* (26 TexReg 13).

Section 355.8021 is amended to continue the current reimbursement methodology for skilled nursing visits, home health aide visits, physical therapy, and occupational therapy services provided by Texas Medicaid enrolled home health agencies. Medicaid enrolled home health agencies will be reimbursed the reasonable cost of supplying the service, applying the same standards, cost reporting period, and cost reimbursement principles used in computing reimbursement for comparable services under Title XVIII Medicare prior to October 1, 2000. Effective October 1, 2000, the Medicare program began reimbursing home health services utilizing a prospective payment system (PPS).

A public hearing was held on January 22, 2001, to accept comments concerning the proposal. The following comments were received from the Texas Hospital Association and Texas Children's Hospital Home Health concerning the proposed rules.

Comment: Concerning the rules in general, both commenters support continuing the current reimbursement methodology for services provided by Medicaid enrolled home health agencies.

Response: Commission agrees with the commenters and will not make any changes to the proposed rule amendment.

The amendment is adopted under the Texas Government Code, §531.033, which provides the commissioner of HHSC with broad rulemaking authority; Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide the Health and Human Services Commission (HHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code, §531.021(b), which provides HHSC with the authority to adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 20, 2001.

TRD-200101597
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Effective date: April 9, 2001
Proposal publication date: January 5, 2001
For further information, please call: (512) 458-7236

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TITLE 7. BANKING AND SECURITIES

PART 1. FINANCE COMMISSION OF TEXAS

CHAPTER 4. CURRENCY EXCHANGE

7 TAC §4.6

The Finance Commission of Texas (the commission) adopts an amendment to §4.6 concerning exemptions from currency exchange, transportation, and transmission licensing requirements. The proposed amendment eliminates provisions rendered redundant by enactments of the 76th Legislature which placed equivalent provisions in Chapter 153 of the Finance Code. The section is adopted without changes to the proposed text as published in the December 29, 2000, issue of the *Texas Register* (25 TexReg 12877), and the text will not be republished.

The amendment neither adds nor eliminates a regulatory requirement. Rather, certain rule provisions are deleted because they are now addressed by statute, see amendments made to Finance Code, Chapter 153, by Act of May 29, 1999, 76th Legislature, Regular Session, chapter 356 (the Act).

The commission received no comments regarding the proposal.

The amendment is adopted pursuant to rule-making authority under Finance Code, §153.002, which authorizes the commission to adopt rules necessary to implement Finance Code, Chapter 153, including rules regarding exemptions from the licensing requirements of Chapter 153.

Finance Code, Chapter 153, is affected by the adopted 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 March 23, 2001.

TRD-200101676
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Effective date: April 12, 2001
Proposal publication date: December 29, 2000
For further information, please call: (512) 475-1300

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

16 TAC §25.41

The Public Utility Commission of Texas (commission) adopts new §25.41 relating Price to Beat with changes to the proposed text as published in the November 10, 2000, *Texas Register* (25 TexReg 11213). This section implements the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §39.202 and §39.406 (Vernon 1998, Supplement 2001) as these sections of PURA relate to the regulation of the price to be offered by affiliated retail electric providers (REPs) for the five year period succeeding the implementation of retail choice. This section was adopted under Project Number 21409.

This section is necessary to establish the calculation methodology and other requirements under which the price to beat (PTB) will be established and administered by affiliated REPs. The commission believes that the 6.0% rate reduction embodied in Senate Bill 7, 76th Legislative Session, is an integral part of the restructuring process in Texas. However, the commission is cognizant of the experiences in other states. Where default services have not been reflective of the market prices of electricity for some or all of the months in a year, the development of a robust market has been largely stunted. Many retail customers who switched providers have returned to the default service during summer months, and in some cases, on a more permanent basis.

In the rule as adopted, the existing base rate structure will be maintained for price to beat rates and each rate component will be reduced by 6.0%. Affiliated REPs will be required to offer a price to beat for each rate and service rider for which a price to beat customer was taking service on January 1, 1999, unless otherwise approved by the commission.

The rule also prescribes how the initial fuel factor portion of the price to beat will be set in accordance with PURA §39.202(b) and permits an affiliated REP to request a seasonal fuel factor for small commercial customers. For residential customers, the rule retains the structure for the fuel factor that currently exists for the integrated utility. The commission finds that imparting seasonality to the fuel factor as provided in the rule should be the only remedy available for affiliated REPs to address potential gaming of the price to beat. The commission has determined that other suggested mechanisms to address the gaming potential such as minimum contract terms if a customer returns to the PTB, seasonal rates only upon return to the PTB, or tracking accounts that effectively pass through market prices to PTB customers (i.e., the TXU seasonal adjustment mechanism (SAM)) should not be adopted because they create significant disincentives for customers to test the competitive market.

The obligation to offer the price to beat expires at the end of 60 months after the beginning of competition. The affiliated REP may also not offer rates other than the price to beat rates for residential or small commercial customers until the earlier of 36 months after competition begins, or when 40% of the residential or small commercial load served by the affiliated transmission and distribution utility prior to customer choice is served by non-affiliated REPs. This section, as adopted, establishes the methodology for calculating the 40% threshold for each class.

This section also establishes procedures under which the fuel factor portion of the price to beat may be adjusted for changes in the prices of natural gas and electricity in the market, in accordance with PURA. The adjustment mechanism for natural gas prices is based on a percentage change in average forward gas prices from the gas prices used in setting the seasonal final fuel factors that will be effective beginning January 1, 2002. As adopted, this section provides for a minimum 4.0% materiality threshold before the fuel factors may be adjusted. Under this standard, if the percentage change in gas prices exceeds 4.0%, then the affiliated REP may petition to adjust the seasonal fuel factor by percentage equal to the change in gas prices. The rule also establishes a benchmark for "headroom" under the price to beat based on the average of the price of a three year contract for full requirements service for price to beat customers and the most recent average 12 month forward prices received for baseload capacity auction products required to be auctioned by Substantive Rule §25.381 of this title (relating to Capacity Auctions). An affiliated REP will also be allowed to adjust the fuel factor portion of the price to beat if the amount of headroom under the price to beat decreases. The combination of these two adjustments is intended to ensure that the price to beat does not become a below market rate where it is initially above market, or become further below market in the event that the price to beat is initially a below market rate in a particular area. The ability of the affiliated REP to make these adjustments will aid in the development of a robust retail market. Furthermore, the use of one and three year forward power prices is intended to strongly encourage REPs to manage wholesale price volatility through the use of longer term contracts and other hedging tools.

Additionally, the commission finds that it is appropriate, after a sufficiently liquid electricity commodity index has developed in an affiliated REP's power region and the power generation company

(PGC) affiliated with the affiliated REP has finalized its stranded cost determination and non-bypassable charges or credits, as appropriate, to allow affiliated REPs to request a change to their fuel factor in order to reflect changes in the price of purchased energy indicated by this index. It is not appropriate to move to such an index until the stranded costs of the affiliated PGC are finalized as any stranded cost charges (or credits to return prior stranded cost collection) will not be finalized until stranded costs are finalized. At that time, if the price to beat for an affiliated REP is in danger of being below market because of high market prices for generation, the return of any excess mitigation, or negative stranded costs if the commission determines that it has the authority to require the return of negative stranded costs, can be used to address concerns about headroom and thereby mitigate the effects of high market prices on price to beat customers. Subsection (g)(1)(F) has been added to allow for this transition and prescribes these preconditions and the method by which an affiliated REP must transition to the use of an electricity index.

This section also establishes criteria for determining whether or not a customer is eligible for price to beat service. Under the rule, all residential customers and small commercial customers with a peak demand of less than 1,000 kilowatts are eligible for the price to beat. If a customer's peak demand exceeds 1,000 kilowatts, the customer is no longer eligible for price to beat service. However, a customer may be eligible again if the customer's peak demand does not exceed 1,000 kilowatts for a period of 12 consecutive months.

Public hearings on the proposed section were held at commission offices on January 11, 2001 at 9:30 a.m. and January 22, 2001 at 1:00 p.m. Representatives from the Alliance for Retail Markets (ARM) (whose members include Green Mountain Energy, AES New Energy, Inc., Exelon Corporation, Strategic Energy, Enron Energy Services and the New Power Company), American Association of Retired Persons (AARP), American Electric Power Company (AEP), the City of Amarillo (Amarillo), the City of Dallas (Dallas), Cities served by TXU (Cities), Consumers Union, Texas Legal Services Center (TLSC), and Texas Ratepayers to Save Energy (collectively referred to as Consumer Commenters), Office of Public Utility Counsel (OPC), Reliant Energy, Inc. (Reliant), Shell Energy Services Company, LLC (Shell), Spectrum Energy (Spectrum), the State of Texas (State), True North, and TXU Energy Services Company (TXU REP) attended the January 11 hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

Representatives from ARM, AEP, Consumers Union, Entergy Gulf States, Inc., on behalf of its retail business (Entergy REP), OPC, Reliant, Texas-New Mexico Power Company (TNMP), and TXU REP attended the January 22 hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

Initial comments were filed on December 11, 2000, by ARM, AEP, Cities, City of Houston and Coalition of Cities (Coalition of Cities), Consumer Commenters, El Paso Electric Company (EPE), the Electric Reliability Council of Texas (ERCOT), Entergy REP, OPC, Reliant, Shell, Southwestern Public Service Company (SPS), TNMP, and TXU REP. CLECO ConnexUS also supported the ARM comments.

Reply comments were filed on January 2, 2001, by ARM, AEP, Cities, Coalition of Cities, Consumer Commenters, Entergy REP, OPC, Reliant, REP Coalition (whose members include Reliant Energy, TXU Energy Services and ARM), Shell, TNMP, and TXU REP.

Others commenting on the rule were AARP, Dallas, and Spectrum.

In the preamble to the proposed rule, the commission posed the following questions:

Question 1: Is the use of the NYMEX natural gas price index referenced in subsection (f)(3) appropriate for the establishment of two seasonal fuel factors? If not, what mechanism should be included in the rule to appropriately reflect the different cost of power in summer and non-summer months?

Several commenters, including Consumer Commenters, Cities, OPC and TXU REP were opposed to the establishment of seasonal fuel factors in general. The Consumer Commenters and TXU REP expressed concern that seasonal fuel factors will alter the existing rate structure of price to beat customers and that altering the rate structure of the price to beat violates PURA and is contrary to the intent of the legislature. TXU REP stated that Senate Bill 7, 76th Legislative Session (SB7) does not require that price to beat rates precisely track the affiliated REP's power costs or that affiliated REP's transfer variations between summer and winter wholesale power prices to retail customers. TXU REP asserted that the seasonal rates resulting from the proposed rule would punish customers, creating the kind of rate crisis that San Diego customers experienced in the summer of 2000.

Entergy REP disputed TXU REP's assertion that Texans will experience monthly market based prices akin to customers in San Diego. Under the proposed rule, Entergy REP stated that the initial seasonal fuel factors in Texas will be cost-based. Once set, the initial factors may be adjusted for changes in fuel prices. In contrast, according to Entergy REP, in San Diego, monthly electric power exchange prices were automatically passed through directly to customers.

Consumer Commenters opposed the seasonal fuel factors and the use of any index to establish the amount of those fuel factors. Additionally, Consumer Commenters argued that Senate SB 7 requires the commission to update utilities' current fuel factors, which do not contain a seasonal differential. Consumer Commenters asserted that PURA §39.202(b) requires the commission to determine the fuel factor for each utility as of December 1, 2001, and that this directive leaves no room for redefining the fuel factor. Consumer Commenters concluded that any change in the fuel factor should be applied as it is today and must be made in a commission fuel reconciliation proceeding. Consumer Commenters expressed concerns about deregulation in other states, including California, that the competitive providers have not been able to offer lower prices to the consumers as they had promised, and that in Texas the only way to raise the price to beat is through a fuel adjustment. Additionally, Consumer Commenters expressed concern over the possibility that while the affiliated REP may be losing money, its parent company would be making money on the sale of power or using its corporate structure in some way to disadvantage the affiliated REP's customers. As such, Consumer Commenters argued that affiliated REPs should be given strong incentives to hedge their risk, and that if they do not they should not be rewarded by getting an increase in the price to beat rate.

TXU REP stated that the commission should not set two or any number of seasonal fuel factors because this approach is punitive to customers, is not contemplated by the price to beat provisions in PURA and is unnecessary since residential and small

commercial customers are unlikely to engage in gaming activities anyway. TXU REP commented that retail price to beat rates to customers were never intended to track costs by month or by season and that no compelling arguments in favor of such treatment have been advanced by other commenters. TXU REP noted that the advocates for seasonal factors are the new non-affiliated REPs like Shell and members of ARM who recognize that an artificial change in summer rates will drive customers away from the affiliated REPs which will benefit non-affiliated REPs.

Consumer Commenters contended that there is currently no summer-winter differential in the existing fuel factors of investor-owned utilities in Texas. Therefore, they concluded, that the most appropriate mechanism to reflect summer-winter differentials would be the opportunity for affiliated REPs to request appropriate adjustments to their fuel factors based on significant increases in the cost of fuel. Several commenters observed that the implementation of seasonal fuel factors where they are not currently in place may have the effect of increasing the total price per kilowatt hour (kWh) in the summer season, which would be inconsistent with the provisions of PURA Chapter 39. AEP stated that this effect is unlikely to result for the AEP companies, since they already have seasonal fuel factors that reflect the higher average cost of generation in the summer months. AEP suggested that concerns about the potential for monthly price increases should be addressed in the proposed rule by making the requirement for a seasonal differential optional. AEP also suggested that affiliated REPs be required to demonstrate that use of seasonal fuel factors would not result in total cost increases in each month.

ARM noted that for many investor-owned utilities, base rates may already reflect some seasonality. Because utilities' base rate structures vary in this regard, ARM concluded, it may be necessary to determine the customer impacts of incorporating different levels of seasonality into the fuel factors for each utility on a case-by-case basis. ARM stated that as a policy matter it may be unreasonable to use *any* kind of broad index reflecting the actual spread between summer and non-summer spot electricity prices for establishing seasonal differentials in the fuel factors, given the adverse impact on customers that may result.

OPC commented that the current price to beat rate structure includes a capacity cost seasonal differential in base rates. Therefore, OPC determined that in the absence of actual experience in the marketplace, there is no reason to conclude that the existing differential is inadequate. Spectrum expressed concern about the price to beat becoming a below market rate. Spectrum also commented that the 10% materiality threshold in the rule as proposed was too high given that affiliated REPs can only request changes in the fuel factor twice per year.

OPC stated that because the proposed fuel factor differentiation may squeeze headroom in the summer, when household electric bills are highest, they do not recommend any form of seasonal differentiation of the fuel factor. AARP also expressed opposition to the staff-proposed seasonality adjustment. Reliant commented that it does not necessarily advocate a seasonal fuel factor.

Entergy REP, Shell and TNMP disagreed with TXU REP and the Consumer Commenters' arguments that PURA does not permit seasonality. Entergy REP and Shell noted that PURA §39.202(b) does not limit the commission to one fuel factor applicable to all seasons. TNMP opposed the elimination of the seasonal factor as proposed in initial comments by TXU REP and Consumer Commenters. If the commission does not allow seasonal factors, TNMP commented, then the affiliated REP would not be able to raise the price to beat to meet higher costs in the proposed summer season which would eliminate headroom and therefore damage the competitive framework.

Shell urged the commission to include seasonal fuel factors in the rule to help insure that the PTB tracks the true cost of power as closely as possible, sending accurate price signals to customers and to the market as a whole. Shell contended that seasonal fuel factors should be mandatory, not optional as some commenters proposed. Shell reasoned that without accurate price signals customers would not be able to react rationally to changes in the cost of power and that competitors may not be able to serve the residential market.

Entergy REP also supported seasonal fuel factors and believes they should be optional, subject to the constraint that the PTB fuel factors would be designed such that the aggregate annual weather-normalized PTB billings with seasonal factors cannot exceed the aggregate annual PTB billings without seasonal factors for the average PTB customer of each rate class. Entergy REP pointed out several advantages to this approach. First, a PTB customer will pay no more, in the aggregate, than a customer without seasonal factors. Secondly, the affiliated REPs can mirror market prices more closely, enhancing headroom. Finally, the effects of gaming will be mitigated.

Shell, ARM, EPE, Entergy REP, Cities, SPS, AEP, and OPC were generally opposed to using the NYMEX natural gas price index for the establishment of two seasonal factors. ARM, SPS, TNMP, OPC, Shell and Cities expressed concern that gas prices are often significantly higher in the winter than in the summer, while the opposite is true for wholesale power costs. The Cities stated that this runs counter to the commission's apparent attempt to increase the summer price to beat to deflate incentives to game the price to beat. ARM further commented that the NYMEX natural gas index does not track either the price curves or the volatility of electricity prices. Other commenters, including AEP, noted that the seasonal differences in the price of natural gas and electricity have historically been inversely correlated. These commenters reasoned that the NYMEX natural gas price index might not be a reliable indicator of changes in the price of purchased energy.

The City of Dallas asserted that the risk of linking the price to beat solely to the cost of gas is that if the cost of other fuels decreases, then the price to beat would be artificially inflated to reflect the rising cost of gas. Subsequently, once the price to beat period expires, the affiliated REPs could then undercut other competitors and drive them away.

Several solutions were proposed in the event that the commission determines that seasonal fuel factors are necessary and appropriate. ARM stated that a differential of a cent ($ .01) between summer and non-summer fuel factors would be a reasonable starting point for addressing the issue of seasonality. ARM stated that at the opening of the retail market, a one- cent seasonal differential should minimize any potential adverse impact on customers, while giving appropriate signals with respect to electricity price.

Consumer Commenters stated that the staff-proposed seasonal one-cent seasonal differential is not about fuel, but about market prices, gaming, and capacity costs and would add between $10-14 to summer electric bills, which in turn would wipe out the 6.0% decrease under the price to beat. Consumer Commenters also stated that whatever the winter rates would be, a one-cent seasonality adjustment would always be approximately $10-14

more in the summer and as such customers would not see any savings in the summer months. Consumer Commenters did not provide any information to support this assertion.

TNMP also disagreed with the initial comments of OPC and ARM that argued in favor of a fixed seasonal differential, as this does not reflect the costs of each of the affiliated REPs. TNMP contended that these seasonal differentials would arbitrarily produce economic "winners" and "losers" out of the affiliated REPs and the non-affiliated REPs that seek to compete with them.

If the commission does include a seasonal fuel differential for headroom purposes, OPC suggested that the initial fuel factor be developed with an initial summer rate, which is five mills higher in the summer than in the winter. OPC stated that the five mill fuel factor seasonal differential would continue in any subsequent adjustment based upon 12-month average fuel prices. OPC also suggested that if the commission prefers a differential which is developed more precisely, it is possible that an alternative to the five mill value could be developed in each initial fuel factor proceeding based upon the utility's gas generating station weighted average heat rate for summer and winter seasons. OPC stated that ARM's one-cent differential was too high and compared it to their own one-half cent. OPC concluded that a half-cent differential would almost double the existing summer bill differential for some utilities. Therefore, OPC recommended that given the large electric bills experienced by air-conditioning users during hot summers, any seasonal differential should be conservatively selected in order to produce a more modest result.

TXU REP suggested that the commission seriously consider the effect that these proposed rate differentials would have on residential and small business customers. TXU REP's analysis indicated that a five mill per kWh increase in the summer months (OPC's compromise position) would increase a typical residential summer bill by 7.0%, and a one-cent per kWh increase as proposed by ARM would increase typical residential summer bills by 13.5%. TXU REP stated that the increase resulting from Shell's recommended use of the ERCOT-B profile would be 32%. TXU REP argued that the SB 7 model was designed to provide benefits for all customers while avoiding mistakes made in other states. Seasonal factors applied to all customers, TXU REP concluded, are not consistent with these objectives. TXU REP particularly disagreed with Shell's proposal to establish seasonal fuel factors based on seasonal differences in wholesale power markets relying on the ERCOT-B index for example, to set seasonal fuel factors for markets within ERCOT. TXU REP contended that the proposals of Shell, OPC and others would produce a rate shock that would lead to a consumer outcry comparable to that recently experienced in California.

Cities' suggested amendments would require each utility filing for its seasonal fuel factors to identify all projected firm purchases of power and purchases of economy (non-firm) energy for which the price paid is determined by the price of natural gas or the cost of gas fired generation. Cities suggested this change is necessary to implement a price to beat adjustment mechanism that tracks the impact of changes in natural gas prices on the cost of purchased power as an affiliate should not be permitted to claim and recover hypothetical increases in cost that would not have been recoverable by the integrated utility. Cities also proposed changes to allow for adjustments to the seasonal fuel factors as a result of the gas generation component of current fuel factors. Cities contended that nuclear fuel, coal and lignite prices will not vary with natural gas prices and that SB 7 only allows for the recovery of increases that are the result of increases in natural gas and purchased power expense.

EPE, Reliant, Shell, SPS, and other commenters proposed that an electricity index be used instead of a natural gas index. EPE stated that the use of a power index will capture the effect of a change in gas prices as well as other power market drivers. Shell agreed and requested that seasonal fuel factors be established based on differences in wholesale power market prices. Shell suggested that the prices from the wholesale market could be obtained from *Megawatt Daily*'s Market Report for the regional hubs serving power markets in Texas.

Entergy REP agreed with the initial comments filed by SPS, Shell, and EPE that proposed that seasonal fuel factors be based on purchased energy prices rather than a natural gas index. Entergy REP stated that the fuel-based seasonal price differential as proposed would not be adequate to reflect the overall seasonal price differential that will occur in the wholesale electricity markets. Entergy REP claims that seasonality based solely on fuel costs ignores the seasonality impacts of non-fuel capacity costs that will be reflected in wholesale electricity prices. Entergy REP stated that setting seasonal fuel factors based on the fuel mix and fuel prices in each season will not accurately reflect the seasonal differences in electricity prices. According to Entergy REP, setting seasonal fuel factors in this way would result in seasonal fuel factors that are flat relative to electricity market prices and would likely induce gaming opportunities that the seasonal fuel factors are intended to prevent. Entergy REP supported the proposal by SPS, Shell and EPE to use an electricity index rather than a natural gas index to set the initial seasonal fuel factor. Entergy REP commented that the seasonal shape would most closely mirror the seasonality of the costs faced by competitive REPs thereby providing customers better economic price signals in each season. AEP agreed that a power index would be more beneficial for establishing seasonal fuel factors. AEP acknowledged that there is difficulty in selecting a forward-looking power index that is robust at the start of competition, although it is likely that one will develop over time. When that happens, AEP asserted, the commission should use this index because it will more closely track the expected seasonality of power prices.

Entergy REP proposed a slightly different alternative. Entergy REP stated that the total annual revenue to be recovered through the fuel factor should be based on the projected fuel and purchased power costs for 2002. To set the initial seasonal fuel factors, Entergy REP recommended that projected 2002 annual fuel and purchased power costs be allocated to summer and non-summer seasons based on a known historical relationship between load weighted electricity spot prices for the summer and non-summer periods (such as in the "Into Entergy" market as reported in a publicly available source) and then divided by the applicable summer and non-summer kilowatt-hours in 2002. This method, Entergy REP asserted, would ensure that the seasonal fuel factors more closely mirror the seasonality of the market costs faced by competitive REPs and would provide customers more accurate price signals in each season. In addition, Entergy REP commented that relying on a historical relationship between spot electricity prices that is objective and verifiable is preferable to determining the seasonality of the initial fuel factor based on a projected, unknown fuel mix. Entergy REP proposed changes in the rule to permit the calculation of separate seasonal rolling averages and the adjustment of seasonal factors based on the

rate of change between separate seasonal rolling averages and the separate seasonal NYMEX baseline moving averages.

Reliant commented that if fuel factors are the only way to prevent seasonal gaming, then Implied Heat Rates (the price of a purchased energy block for a period divided by the price of natural gas for the same period) rather than natural gas prices, should be used to shape the seasonal fuel factors. Reliant contended that seasonal fuel factors should be used for all price to beat customers and that seasonal fuel factors must be initially shaped and subsequently adjusted using Implied Heat Rates. Reliant proposed that seasonal fuel factors be obtained by calculating one fuel factor, and then shaping the fuel factor for seasonality. Reliant assumed that this process would repeat for each fuel factor adjustment. In other words, under Reliant's proposal, a new single fuel factor would be calculated for each requested adjustment, using the mechanism detailed in the "PTB ADJUSTMENT" section in the Coalition Reply Comments. This formula is discussed in more detail in Question 2 below.

If the commission does not accept Reliant's proposal for seasonality, Reliant recommended that (1) no seasonal adjustment be used, and (2) that price to beat customers (residential and small commercial with demand less than 50 kW) who leave and then return to the affiliated REP be required to choose from one of the following requirements: (a) a seasonal price to beat rate rider equal to the incurred summer subsidy calculated using actual prices from the balancing energy market; or (b) balanced billing, with the affiliated REP having the ability to request a deposit to cover the initial balanced billing subsidy, in addition to the deposit allowed under the customer protection rule. Reliant also suggested that regardless of seasonality, all returning small commercial customers with a peak demand greater than 50 kW should be required to accept a minimum term of one year with a buyout equal to the incurred summer subsidy calculated using actual prices from the balancing energy market.

Cities urged the commission to refrain from instituting a seasonal fuel factor until evidence suggests that residential and small commercial customers are gaming the price to beat.

Upon further consideration, Reliant proposed that seasonality should not apply to residential customers under any circumstances. Restrictions on individual PTB customers should be limited to returning small commercial customers with a peak demand, either in the aggregate or on an individual meter basis, exceeding 50 kW. Reliant proposed that such returning customers be subject to one of two restrictions: (1) seasonal rates, or (2) a tracking mechanism that calculates a running account of the actual cost to serve such customers versus the actual charge to such customers based on allowed summer rates.

TNMP asserted in reply comments that the commission should use three seasons, rather than two, to more accurately reflect the changing energy prices. Entergy REP suggested that the seasonal factors be calculated for the periods of May through September and October through April to reflect the fact that summer load conditions begin in May. ARM agreed with Entergy REP that the summer season should include the month of May.

TNMP stated that the commission should clarify the language of the rule to ensure that the differential in the summer and winter NYMEX natural gas index does not equal the differential in the summer and winter fuel factors. If this change is not made, TNMP asserted it would result in an artificially low price to beat and the concomitant loss of headroom during the summer season, stifling competition and saddling the affiliated REP with a price to beat under which it will suffer losses.

Cities stated that the fuel factor adjustment as proposed is a one-way street in favor of the utilities. Cities suggested that the commission and other parties have the authority to request an adjustment to the PTB fuel factors. In the alternative, Cities suggested that any surcharge should be regarded by the commission as a temporary surcharge. Cities suggested that if gas prices fall 10% below a threshold the surcharge would expire.

Cities expressed concern that the proposed rule permits only the affiliated REP to request an adjustment to the fuel factor and that the one-sided request ensures that the fuel factor will never be lower than its initial level. Cities also objected that the proposed rule does not require any resulting over-recoveries to be flowed back to customers.

The commission finds that under the plain language of PURA §39.202(l), only the affiliated REP can request a change in the fuel factor portion of the price to beat. Furthermore, the commission finds that the combination of the ability to choose service from alternate providers, natural competitive forces, and the operation of the "clawback" under PURA §39.262(e) in the 2004 true-up provide compensation to ratepayers for the price to beat being an above market rate. Finally, one of the benefits of the implementation of retail choice is that there is a more efficient avenue for customers to receive lower prices than through commission rate proceedings.

The commission disagrees with TXU REP, Consumer Commenters, OPC and others that seasonal fuel factors are not contemplated under PURA. PURA §39.202 states that the commission shall determine the fuel factor for each electric utility as of December 31, 2001. PURA Chapter 36 contains the authority for the commission to establish rates. Fuel factors are specifically discussed in §36.203. Section 36.003 provides that rates must be just and reasonable, and rates may not be unreasonably preferential, prejudicial, or discriminatory. There is no specific grant of authority to set seasonal rates, but the commission has for some time set rates that include seasonal variation, including fuel factors, under the broad authority contained in Chapter 36. The commission notes that all investor-owned utilities currently have seasonal base rates, and that the AEP utilities (Central Power & Light Company, Southwestern Electric Power Company and West Texas Utilities Company) currently also have seasonally differentiated fuel factors. The commission concludes that it has the authority under PURA to establish seasonal fuel factors under the PTB.

The commission further disagrees with those commenters, including Consumer Commenters and AARP, who suggested that seasonal fuel factors will increase customer bills and eliminate the 6.0% PTB decrease and send inappropriate price signals, comparable to those being experienced in the California electric market. First, unlike California, the statute expressly permits a portion of the price to beat (fuel factor) to be adjusted based on significant changes in the costs of natural gas and purchased energy. By contrast, as noted by Entergy REP, in San Diego, monthly electric power exchange prices were automatically passed through directly to customers. Additionally, under a one-cent seasonal differential, customers with average usage would still receive the 6.0% rate decrease contemplated under

PURA §39.202(a) on an annual basis. A one-cent seasonal differential would likely eliminate the 6.0% decrease in the summer months (June-September) for customers with average usage. However, such seasonality would not increase a customer's bill over what it would otherwise have been under regulation for the summer months. Moreover, these customers would receive greater decreases in the non-summer months. On an annual basis, price to beat customers with average usage would receive the 6.0% rate decrease contemplated under PURA §39.202(a).

After consideration of the comments received by parties on the issue of seasonality and given the concerns voiced by some parties about the perceptions of the impact on high summer- usage customers and a recognition that residential customers are less likely to exhibit switching behavior that would take advantage of the fact that the PTB may be below market during the summer months, the commission finds that it is reasonable to allow the affiliated REP to request a seasonal fuel factor for small commercial price-to-beat customers (as defined in subsection (c) of the rule) only at this time. The commission does find that nothing in PURA prohibits the commission from setting seasonal fuel factors for all customers, as it currently does for the AEP companies. However, in order to provide continuity for residential customers during the initial transition to a competitive market, the commission declines, at this time as a matter of policy, to introduce seasonality into the residential fuel factor where it does not exist today. For utilities with existing seasonal fuel factors, the commission finds that it is appropriate to allow their affiliated REPs to retain the seasonality that exists in the current fuel factors for all customers, if they so desire.

The commission finds that imparting seasonality to the fuel factor is the only remedy that will be available for the affiliated REP to address gaming concerns. The commission believes that other mechanisms that have been proposed to address the gaming potential such as minimum contract terms if a customer returns to the PTB, seasonal rates only upon return to the PTB, or tracking accounts that effectively pass through market prices to PTB customers (i.e., the TXU seasonal adjustment mechanism (SAM)) should not be adopted because they create significant disincentives for customers to test the competitive market.

Subsection (f)(3)(C) of the rule has been revised accordingly.

Question 2: Is the use of the NYMEX natural gas price index referenced in subsection (g)(1) the appropriate mechanism to use in adjusting the fuel factor for significant changes in the price of natural gas and purchased energy? If a purchased power index should be used instead of the gas price index, what index should the commission use? Are there other adjustment mechanisms that would more accurately reflect significant changes in the price of natural gas and purchased energy?

This was by far the most controversial aspect of this rule. Virtually all commenters who filed comments and/or participated in the public hearings on this rule expressed an opinion on this issue. The commenters were sharply divided on this question. Some commenters, particularly Consumer Commenters, OPC and Cities, were generally opposed to the use of a purchased power or energy index. A number of other commenters, including most of the utilities and the REPs were strongly in favor of using some type of energy index to adjust the fuel factor portion of the price to beat. Numerous proposals, including gas-only, a combination of gas and purchased energy and purchased energy-only were suggested in comments and at the public hearings. The commission carefully considered all of these proposals before making its decision on this issue.

ARM and Shell commented that the index used in adjusting the fuel factor was not as important as insuring that the initial price to beat fuel factors are set at the proper level. These commenters noted that a competitive market will not develop if the PTB is set at a level below the price that new market entrants must pay to purchase power and ancillary services.

No commenter supported a natural gas price index as the sole mechanism to adjust the price to beat throughout the entire price to beat period. Reliant commented that natural gas by itself is not an adequate means for adjusting the fuel factor. Reliant stated that the old regulatory regime of reconcilable fuel, energy and capacity will be gone on January 1, 2002. After the choice date REPs will buy power, not natural gas or any other generation fuel. Reliant stated that market forces of power supply and demand will affect the price of power and natural gas will be only one component in the market. Reliant and other commenters asserted that natural gas prices have not historically been perfectly correlated with power prices. In fact, Reliant asserted that since power began trading in ERCOT gas price movements explain only 17% of the variance in electric price movements.

TNMP and Entergy REP did not oppose the use of the NYMEX natural gas index if it applied only to the natural gas portion of the utility's current fuel mix. Entergy REP proposed to track changes in the forecasted price of natural gas and apply the changes to the gas portion of the fuel mix rather than applying the changes to the entire fuel factor as proposed in the rule. Under this scenario, Entergy REP proposed to keep the cost components fixed, for example, coal and nuclear, since the prices for those inputs are not as volatile and the costs are generally fixed under the fuel factor rules today. Entergy REP stated that its proposal to adjust the fuel factor would maintain stability in the way that rates are set and adjusted and that it would be relatively straightforward to implement, while also avoiding the problems associated with relying on illiquid electricity forward prices.

TNMP stated that it did not oppose the proposed rule's reliance on the NYMEX gas index because it agrees that the commission should use a transparent index of electricity market prices. TNMP did not believe such an index currently exists. However, TNMP suggested that the commission also consider the impact of the NYMEX on the affiliated REP by applying the NYMEX to a formula that incorporates the affiliated REP's resource mix. Therefore, TNMP concluded, the commission should allow for two types of adjustment mechanisms; one would entail a simple change in the price of the NYMEX and the second would entail a more detailed analysis of the affiliated REP's projected resources similar to the fuel factor proceedings that occur today. TNMP provided sample formulae for these scenarios.

TXU REP stated that the energy purchases the affiliated REP will make beginning in 2002 are unlikely to be fuel-specific and will be based on highly confidential, highly competitive business agreements. According to TXU REP and others, it would be wholly contrary to the intention of SB 7 for the commission to continue to apply traditional fuel factor regulation to an affiliated REP's energy purchases, much less make a prudence determination regarding them.

AEP proposed that a forward looking NYMEX natural gas strip that matches the adjustment period should be used because it would allow the affiliated REP to appropriately hedge and would reflect changes in competitive retail electricity prices vis-à-vis the price to beat. AEP stated that since natural gas is the fuel on the margin in Texas, and since the initial fuel factor already reflects the current fuel mix of each utility, it is more appropriate initially

to adjust the fuel factor by the changes in the marginal fuel -- natural gas. AEP reasoned that when a robust forward-looking purchased power index is available, it should be utilized, since it will better track the changes in prices paid by affiliated REPs for supply and the prices that affiliated REPs will use to compete. AEP concluded that adjusting the fuel factor by fuel mix, as some parties have suggested, will not accurately reflect the market conditions for purchasing electricity faced by the affiliated REP and will serve to artificially lower an affiliated REP's fuel factor adjustment.

Other parties contended that an electricity index would be a more appropriate tool for adjustment. TXU REP, ARM, EPE, Entergy REP, SPS and Shell, stated that a purchased power index is a more appropriate way to track changes in the price to beat fuel factor. Shell emphasized that this is an electricity market -- not a natural gas market, therefore changes in the price of purchased power should be the key determinant in adjusting the fuel factor to calculate the price to beat. Shell urged the commission to base changes in the fuel factor on changes in regional power prices as published in *Megawatt Daily*'s Market Report.

EPE stated that relying solely on the use of a gas index to control the fuel factor component fails to adequately take into consideration other key drivers that affect the price of power. EPE also stated that since it is the only Texas utility in the Western Systems Coordinating Council, the use of the NYMEX Palo Verde power price index is the most appropriate indicator of the price of power that is available for delivery to the El Paso region. EPE reasoned that realizing that non-affiliated REPs will have the ability to pass power costs through to their customers, the commission should consider using a single index for affiliated REPs that is comparable so that customers can make an apples-to-apples comparison in choosing a REP. EPE concluded that if a single mechanism is to be used to control the fuel factor component of the price to beat, it should be a power index since that is the commodity that all REPs will trade. SPS stated that an electricity price index should be used to establish the seasonal fuel factors since the REP is not directly exposed to gas prices because it does not own generation.

TXU REP suggested that an electricity index is consistent with the statutory language and superior to a natural gas index for several reasons. The legislature used the terminology "natural gas and purchased energy" with the knowledge that an affiliated REP was prohibited from owning generation and therefore, would not have gas costs that change over time. While a natural gas index captures changing market conditions in the natural gas market, it is not indicative of changes in the electricity market. Conversely, changes in the natural gas market will be subsumed in an electricity index.

Cities maintained that if the PTB is indexed to market prices, the appropriate base for the index is the cost of generation embedded in the PTB. Cities also stated that any changes in the price to beat fuel factor should be temporary, expiring on the first day of the month following a decrease in natural gas prices below the 10% benchmark established in subsection (g)(1)(C). Cities asserted that this adjustment was consistent with its belief that a transitory spike in gas prices should not permanently enrich the affiliated REP.

TNMP argued that the commission should reject proposals to have fuel factor adjustments expire after a certain period of time. TNMP asserted that this proposal is prohibited by PURA which provides for changes to fuel factors only to reflect changes in natural gas and energy prices or where the affiliated REP's financial integrity is threatened.

Reliant concluded that in order to assure adequate headroom, and thus, robust competition, it is critical that the price to beat accurately track the actual price of power, and since the fuel factor is the only mechanism to adjust the price to beat it should be based not only on the price of gas but on the prices of purchased energy as well.

TXU REP stated that the natural gas price index referenced in subsection (g)(1)(A) of the proposed rule would not adequately reflect changes in the cost of electric energy purchased for consumption by customers. TXU REP noted that this is problematic because in all cases affiliated REPs will be purchasing electric energy, but in no case will they be purchasing natural gas for consumption in generating facilities. TXU REP also expressed concern that capacity auctioned and sold will not be available to the affiliated REP from its affiliated PGC. TXU REP asserted that in addition to the purchased power that the affiliated PGC already acquires to meet the customer requirements of the integrated utility today, it will also have to acquire power to replace capacity auctioned and sold. TXU REP contended that the cost of this additional capacity is not reflected in existing purchased power contracts, but will have to be reflected to track the affiliated REP's cost changes during the price to beat period since use of the NYMEX index would not capture these costs. TXU REP stated that a number of factors ranging from generation capacity shortages to transmission constraints and major outages could have a significant impact on the cost of purchased power. TXU REP concluded that the best method to track and adjust for those variations in fuel and purchased power costs is to set and index the fuel factor against a tradable power index. Unfortunately, TXU REP pointed out, a power index equivalent to the NYMEX Henry Hub gas index does not exist within ERCOT at this time, although it is reasonable to assume that an ERCOT futures market will develop during the first five years of the price to beat. Therefore, TXU REP proposed that the rule utilize the NYMEX Henry Hub gas index to adjust the initial fuel factor established under the proposed rule. TXU REP concluded that after a futures market has been developed for ERCOT power and an index is developed that more accurately reflects the affiliated REP's cost of purchasing energy, then future adjustments of the REP's fuel factor should be based on this index.

OPC disagreed with TXU REP on use of an electricity index. OPC stated that even as future indices are developed, it is uncertain whether the transactions will reflect a liquid, fully competitive market. More importantly, OPC stated it is unlikely that such indices will reflect the bulk of bilateral contracts that would comprise the market structure in Texas.

Consumer Commenters also disagreed with proposals to use a purchased power index for adjustments to the price to beat fuel factor. Consumer Commenters stated that a purchased power index, or any index which includes capacity costs should not be substituted for the fuel factor in the price to beat. Consumer Commenters stated that the commission's current rules permit the recovery of purchased "energy" costs through the fuel factor, but prohibit the recovery of purchased "power" capacity or demand charges. Consumer Commenters and Coalition of Cities pointed out that PURA §39.202(l) uses the term "purchased energy", not "purchased power" with regard to fuel adjustments under the price to beat. They also stated that an index will not account for discontinued contracts and other factors that would

lower fuel costs. Therefore, they reasoned, it is inappropriate to use any automatic cost adjustment process because it will likely overcharge residential customers. Consumer Commenters also objected to use of an ERCOT wholesale index. Because the ERCOT generation market is designed as a bilateral contract market the price of most power purchases will not be publicly available and thus, Consumer Commenters concluded, the only type of index that could be developed would be based on spot purchases or balancing energy -- both high price products.

The Coalition of Cities stated that the price to beat is intended to guarantee residential and small commercial customers a 6.0% rate reduction and to protect such customers from potential rate increases caused by competition. The Coalition of Cities noted that the Legislature limited adjustments to two scenarios. First, the price to beat can be adjusted to reflect significant changes in the price of natural gas and purchased energy. Secondly, an adjustment can be made to protect the financial integrity of the affiliated REP. The Coalition of Cities contended that the term "purchased energy" is not synonymous with the term "purchased power." According to the Coalition of Cities, the term purchased power is much broader than purchased energy and includes things such as the charges for capacity costs that are not included in purchased energy. The Coalition of Cities concluded that if affiliated REPs are allowed to adjust the price to beat for differences in the price of power, the price to beat would be rendered meaningless. Cities also commented that an index based on firm purchased power cost would not accurately measure the change in the price that price to beat customers would have paid with continued regulation. OPC was also skeptical that an index could be developed for purchased power transactions that will be compatible with adjustments to the fuel factor.

TNMP clarified at the January 22, 2001, workshop that more recent contracts typically do not have capacity components. Since TNMP has no purchased cost recovery factor (PCRF), it recovers its purchased energy costs through its fuel factor.

AEP urged the commission to consider the implementation of a quarterly adjustment mechanism to more accurately reflect PTB fuel and purchased power costs.

Since there is no reliable energy index at this time, several commenters proposed methods to solve this problem. Reliant stated in its initial comments that the new purchased energy product could be determined in a number of ways, although the joint comments with the Coalition detail Reliant's preference. Reliant expressed confidence that public indices will be developed for purchased energy. In the interim and until such indices develop, Reliant committed to working with the Intercontinental Exchange to develop such a product for market opening. Alternatively, Reliant suggested that pricing for a 5 x 16 product could be crafted from the existing capacity auction product by: (1) dividing the premium for the baseload capacity auction product by the on-peak hours in the delivery period and then adding the strike price; and then (2) dividing that result by the average gas price over the delivery period. Finally, Reliant stated that the new purchased energy product could be determined from *Power Markets Weekly* reports 5 x 16 and 5 x 8 (overnight) data, but not weekends. In order to directly use the baseload capacity auction product price (premium divided by capacity factor plus strike), Reliant concluded weekend data could be extrapolated from the weekday data by using a 50% weighting of the 5 x 16 data and a 50% weighting of the 5 x 8 data.

Reliant proposed a solution based on the Implied Heat Rates (price of purchased energy/price of natural gas) that Reliant stated would introduce the concept of purchased energy into the fuel factor adjustment calculations and make them more meaningful and accurate. Reliant proposed the following formula for fuel factor adjustments and the Coalition adopted this formula for the adjustment of the fuel portion of the price to beat:

$$\text{Fuel Factor}_{new} = \text{Fuel Factor}_{base} * (1+((\text{Gas}_{new} - \text{Gas}_{base})/\text{Gas}_{base})) * (1+((\text{Heat Rate}_{new} - \text{Heat Rate}_{base})/\text{Heat Rate}_{base}))$$

Where:

$\text{Fuel Factor}_{base}$ = The fuel factor at the time an adjustment is requested. After the fuel factor has been adjusted the first time, it would be the fuel factor currently in use at the time an adjustment is requested.

Gas_{new} = NYMEX futures price calculated under §25.41(g)(1)(A)-(B). The Coalition recommended that the 60-day average contained in the proposed rule be shortened to any one day between the date of the last energy auction and the scheduled date of the next energy auction.

Gas_{base} = NYMEX futures price calculated under as proposed. For the first fuel factor adjustment, it would be the NYMEX futures price calculated under proposed §25.41(f)(3)(D). For all subsequent adjustments, it would be the Gas_{new} from the immediately preceding fuel factor adjustment.

Heat Rate_{base} = the Implied Heat Rate calculated from the last fuel factor adjustment request. The Implied Heat Rate would be calculated by dividing the power prices for any given period by natural gas prices from the same trading day for the same delivery period. For the initial adjustment request, this number would be calculated by dividing the daily Peak ERCOT Index Power Price data from *Power Markets Weekly* by the daily gas price data from Gas Daily's Houston Ship Channel index, averaged over the entire calendar year 2000. For all subsequent adjustment requests, this number would be the Heat Rate_{new} calculated in the immediately preceding fuel factor adjustment.

Heat Rate_{new} = the Implied Heat Rate from the purchased energy product, which is sold as an annual forward. This value would be calculated by dividing the forward power price from a purchased energy product by the NYMEX futures gas price from the same trading day for the same delivery period covered by that product.

Ideally, the Coalition stated, the Implied Heat Rate should be calculated from a publicly traded product. Until such a product trades in ERCOT the Coalition recommended that auctions should occur on September 1 (covering energy delivered the following January through December), March 15 (covering energy delivered the following June through May) and July 15 (covering energy delivered the following November through October) of each year. According to the Coalition's recommendation, each auction would involve 1.0% of the Texas jurisdictional installed capacity of the affiliated PGC. To ensure compatibility with true market prices, auctions should be conducted under standard terms and conditions. As part of the Coalition's proposal, auction products would be sold pursuant to a standard agreement such as the Edison Electric Institutes' Master Power Purchase & Sale Agreement and credit terms should generally follow the capacity auction rule. The Coalition stated that these auctions would generate individual monthly prices for 5 x 16 firm energy to be delivered in the time period covered by the auction.

At the same time the auction occurs (i.e., September 1, March 15 and July 15), the Coalition stated, the NYMEX gas futures price for gas delivered in each month of the same time period covered by the auction would be calculated. The monthly 5 x

16 firm energy price would then be divided by the monthly gas price to obtain a monthly Implied Heat Rate for each of the 12 months covered in the auction. Finally, these monthly Implied Heat Rates would be averaged to obtain the Heat $Rate_{new}$. Until the Heat $Rate_{new}$ value is calculated based on a publicly traded product instead of an auction, all affiliated REPs requesting a fuel factor adjustment would use the same Heat $Rate_{new}$ in the fuel factor adjustment formula (i.e., all affiliated REPs would conduct the auctions described in this paragraph on the same day, and these auctions would generate one Heat $Rate_{new}$ for all affiliated REPs).

The Coalition recommended that, at the affiliated PGC's option, the auctioned capacity would count toward the 15% total statutory requirement in PURA §39.153. Ideally, the Coalition commented, a commodity product for ERCOT future energy price will develop and once trading volumes reach significant levels, that product should be used in place of the auction prices explained above.

This proposal is not a pass-through of purchase power costs, the Coalition noted. The Coalition pointed out that this is a critical distinction because it means that this proposal would not result in the same market problems that San Diego experienced, because this proposal encourages all REPs to hedge on a forward basis rather than to purchase on a daily spot basis and then pass on the volatile costs or to accrue those costs for future collection. This divergence from the traditional fuel factor model is necessary because the prices of natural gas and purchased energy are not adequately correlated to allow natural gas to serve as a proxy for both the REP Coalition concluded.

Reliant noted that in general there is a pricing continuum with two pricing alternatives (fixed and spot) and two purchase contracting alternatives (fixed and spot). Some alternatives leave the REP more at risk while others leave the customers more at risk. Reliant contended that at one extreme for example there is a fixed retail price and a spot purchase contract price that would result in a situation similar to the one experienced in California by Pacific Gas and Electric (PG&E) and Southern California Edison (SCE) while a spot purchase contract price and a spot retail price would bring about a situation similar to the San Diego situation. Reliant commented that the Coalition Proposal falls somewhere in between, where there is a small margin for exposure to volatile prices by either the REP or the customer.

AEP stated that the Reliant and the Coalition proposals have some merit in that they attempt to make use of forward electricity and natural gas prices by incorporating an Implied Heat Rate mechanism. AEP's primary concern with using power prices to adjust the seasonality of fuel factors is that there is currently not an existing robust forward-looking power index. AEP also proposed that the timing should be adjusted to reflect forward-looking natural gas prices rather than lagging prices in order to prevent a timing problem. AEP also expressed concerns with the heat rate proposed by Reliant and the Coalition. AEP noted the inherent dichotomy between the Gas_{new} portion of the formula (which is a 60-day moving average of NYMEX futures prices) and Heat $Rate_{new}$ (which is an Implied Heat Rate from the purchased energy product sold as an annual forward). Specifically, AEP questioned whether the power price used to incorporate the Heat $Rate_{new}$ would be taken at one point in time and then compared against future forward looking gas prices taken at another point in time. AEP stated that such a mismatch could result in fuel factor adjustments that bear no resemblance to actual changes in market prices of electricity.

OPC claimed that Reliant's fuel adjustment mechanism proposal is apparently intended as a revision to the mechanism Reliant suggested in its business separation plan (BSP) filing. The difference is only semantic, making the adjustment mechanism appear to be a fuel price adjustment. In fact, the proposal for an "implied heat rate adjustment" to the change in NYMEX gas prices, OPC deduced, is a thinly disguised power cost index. By applying changes in the gas-cost-to power-cost ratios to the gas price index, the proposed adjustment is mathematically the same as a power cost index. OPC stated that it is subject to the same criticism discussed in OPC's initial comments.

ARM suggested that the fuel factors should be shaped to reflect the different load factors for the PTB customer classes, since the 5 x 16 energy auction products described in the Coalition's reply comments would not be appropriate for serving all classes. While load factors have not typically been taken into account in establishing fuel factors in Texas, this is common in other states, according to ARM, and nothing in PURA prevents the commission from doing this on a going-forward basis. ARM recommended that such shaping could be preformed by the parties in connection with the technical conferences recommended by Entergy REP in its initial comments.

If the commission declines to adopt the Coalition proposal, ARM suggested that the commission allow the fuel factor to adjust for changes in the price of natural gas, using the NYMEX Henry Hub as an indicator of change, until a reliable, liquid energy index develops. ARM proposed that the following factors could be used to determine whether a market is sufficiently liquid:

1. The index should be published, verifiable, and independent (e.g., an exchange);

2. The index should exhibit significant trading volume;

3. The index should exhibit small bid/asks spread; and

4. The index should have at least a couple of years of published price history.

For instance, a good index would have two to three years of price history, several million megawatts' (MWh) of volume trading every day, daily trading of contracts at least three years out, and prompt-month bid/ask spreads of less than $0.25. ARM suggested that the commission should solicit public comment on whether a proposed index meets these criteria prior to effecting this change. The entire fuel factor should be adjusted by the change in price.

AEP was unclear how Reliant's proposed formula for the adjustment of the fuel factor would affect Central Power and Light (CPL) and Southwestern Electric Power Company (SWEPCO). AEP stated that CPL is only required to auction capacity for one year as a result of their merger agreement and that SWEPCO will be auctioning capacity in a different market.

Reliant, responding to a request for a plan with a phase-in approach presented a compromise proposal (Compromise Proposal) at the January 22 workshop. Although this was not Reliant's preferred approach, Reliant could support it.

The Compromise Proposal would be a phase-in over five years although Reliant stated that different phase-in periods could also be implemented. In 2002 there would be a 100% historical based price to beat. The natural gas price index would be used to adjust the price to beat and the materiality threshold used to make adjustments to the fuel portion of the price to beat would be reduced from 10% to 4.0%. In 2003, 50% of the fuel factor could be

adjusted for changes in the natural gas prices according to the Compromise Proposal, and 50% would be adjusted for changes in electricity prices based on the ratio of the premium price in the most recent one-year or aggregated 12 months of baseload capacity auctioned to the premium price in the September 2001 baseload capacity auction. In 2003, the materiality threshold would remain at 4.0%.

In the period between 2004 through 2006, under the Compromise Proposal, 100% of the price to beat adjustment would be based on the electricity price index that would be indicative of the current market prices of baseload power. The fuel factor would be multiplied by the ratio of the current electricity price index to the price of power paid in the September 2001 capacity auction or the most recent baseload capacity auction price or index used to adjust the price to beat. If an appropriate price index develops that is representative of different types of product than the baseload capacity product, 100% of the price to beat adjustment would be based on the ratio of such index to the September 2001 capacity auction price paid for auction products that correspond to the index product.

During 2004-2006 the materiality threshold would be 2.0%. The Compromise Proposal would also reduce the period that closing forward 12-month gas prices are averaged from 60 days to 5 business days and revise subsection (g)(1) as proposed to state that a REP may file a fuel factor adjustment request that is based upon the results of a full requirements request for proposal (RFP) to provide service to at least 10% its expected price to beat load for three years. The adjustment, in $/MWh would be the difference between the low bid offered by suppliers and the current price to beat minus all non-bypassable charges, losses, ERCOT fees, commission assessments and gross receipt taxes, minus $5/MWh.

Reliant stated that given the size of its price to beat loads there would be only one entity from which it could purchase sufficient power to serve its price to beat load -- its PGC. Reliant expressed concern over being required to enter into a below market contract with its PGC without some safety guarantee from the commission regarding its treatment of the affiliated PGC in the excess cost over market (ECOM) true up. Therefore, an important aspect of the Compromise Proposal would be that the affiliated REP would enter into three to five year contracts with the affiliated PGC for a declining portion of its price to beat load. The contract prices would equal the regulated cost in the ECOM model for baseload units and ECOM market price for gas units. Reliant noted if the ECOM model provides that a baseload unit is valued at $43 in 2002 but under the buy back contract they have to sell at a lower cost of service price, i.e., $36, the issue is how the $7.00 differential is treated? Again, Reliant sought assurances that it would not be required to bear the risk for not recovering this differential in the ECOM true-up.

AEP agreed with Reliant that if the commission decided that an adequate fuel portfolio must include buyback contracts between the affiliated REP and the affiliated PGC, the affiliated PGC should not be penalized in the PURA §39.262 true-up valuation of ECOM for entering into long-term contracts with its affiliated REP. AEP stated that power contracts between the affiliated REP and the affiliated PGC should be allowed at either (1) market prices, or (2) prices equal to or greater than the PTB less the sum of transmission and distribution charges (T&D), other non-bypassable charges (NBCs), and the ERCOT administrative fee (EF). If the affiliated REP has conducted a Request for Proposals for its power needs and receives no price equal to or less than PTB less (T&D+NBCs+EF), then, by definition, the PTB has been set at less than the market price. If this is the case, AEP contends that the contract between the affiliated REP and the affiliated PGC should be deemed to be equivalent to a market-based contract for purposes of the ECOM valuation in the PURA §39.262 true-up proceeding. Given such a determination, the ECOM of the PGC should not be reduced or otherwise adjusted as a result of such a contract.

Entergy REP agreed that using long-term contracts between a PGC and the affiliated REP in order to hedge the risks associated with its PTB obligations would help to protect the financial integrity of the affiliated REP and provide a more stable transition to competition. However, there are other ways that an affiliate REP can hedge, including buying power and fuel products such as forward strips and options from the market, financial instruments, or auctioning full requirements service through an RFP. Entergy REP commented that each REP should have the flexibility to pursue the hedging strategy that best meets its needs.

AEP responded to the PGC buy-back issue by stating that it was concerned that if the REP is prohibited from contracting with the affiliated PGC whether at market or some other price then the REP could end up in a similar situation similar to California. AEP expressed concern about a situation where output has been sold to a third party. Knowing that the REP has to buy at that location, AEP contended that the price could be driven up as the REP is caught in a short squeeze.

OPC commented that to the extent that the commission believes it is necessary to modify the PTB in order to insulate the financial health of the affiliated REP, approval of such buy back contracts is the lesser of evils. The impact of such buy backs upon the market- based valuation of the generation assets during the true-up could be minimized through strict limitation on the duration of such contracts and in reality may have no adverse impact upon the valuation. The utilities' choice of market valuation methods (i.e., complete divestiture versus sale of minority ownership in the capacity) is likely to have a more significant impact upon the robustness of the market valuations. OPC did not agree with Reliant's view that buy back contracts should alter the reconciliation procedure for the 2002-2005 period specified in PURA. According to OPC, the law contemplates that the affiliated REP will undertake the risk of offering the PTB and does not contemplate that the cost of the utilities' efforts to shield the REP from such risk should be added to the ultimate amount of stranded cost.

Cities stated that if a utility chooses to hedge affiliated REP risks through contracts with the affiliated generating company, the mix of baseload and gas capacity purchased should match the PTB load shape.

Shell opposed a delay or phase-in of PTB rates that reflect the true market cost of power, believing that under Reliant's proposal, non-affiliated REPs will not be able to compete until after 2006. Shell believed that until then the PTB will be below market and competitors will only be able to enter the market by selling at a loss.

At the January 22 workshop, TXU REP proposed its own phase-in compromise position. It proposed this approach for commission consideration to accommodate future fuel factor adjustments, as needed, based on changes in the market price of natural gas until a viable purchased energy index develops.

Among other provisions, the TXU REP phase-in compromise would use an initial 4.0% materiality threshold before fuel factor adjustments could be made, with the threshold being reduced to

2.0% in 2004. TXU REP noted that a threshold requirement is unnecessary because affiliated REPs will be limited to two fuel factor adjustments each year. If the purpose of a threshold is to prevent frequent and confusing rate changes for customers, the two-adjustment limitation will accomplish that objective without leaving the affiliated REP exposed for unrecoverable changes in market prices. Nonetheless, in order to develop a mechanism acceptable to as many interested parties as possible, TXU REP proposed an initial threshold starting at 4.0% and moving to 2.0% in 2004.

In 2003, TXU REP proposed to adjust 50% of the fuel factor based on the ratio of the premium price in the most recent one-year or aggregated 12 months of baseload capacity auctioned to the premium price in the September 2001 baseload capacity auction. For the years 2004 through 2007, the entire adjustment to the fuel factor would be based on one of the following:

1. The ratio of the current electricity price index (indicative of current market prices for baseload power) to the price of power paid in the September 2001 baseload capacity auction (or the most recent baseload capacity auction price or index price used to adjust the fuel factor).

2. If an appropriate price index develops that is representative of a different type of product than a baseload capacity product, the ratio of such an index to the September 2001 capacity auction price paid for auction products corresponding to the index product.

3. If no appropriate index is available, then the same as the electric price ratio in 2003, but using the most recent capacity auction price used to adjust the fuel factor as the denominator.

The commission requested TXU REP to work with other interested parties on the concepts contained in its proposal and to clarify the "fail safe" language that would insure that the price to beat is always an above market rate. In comments subsequent to the January 22 workshop, TXU REP reported that a modified version of the phase-in compromise supported by certain other interested parties had been developed. TXU REP supported the newest version, but also supported the version presented at the January 22 workshop as well as the original Coalition proposal detailed in reply comments filed on January 2, 2001.

AEP supported several aspects of TXU REP's phase-in-proposal. First, AEP agreed that it is appropriate to apply the fuel and purchased energy adjustment to all of the costs of the utility as opposed to some portion of the costs of the utility. AEP stated that linking the adjustment to the current mix does not allow the market to open effectively. AEP also supported the fact that this proposal would utilizes fewer days for the initial gas index, which would provide utilities a better ability to hedge. Finally AEP supported the move from a natural gas index to an electric power index. AEP noted that there was a variation of this proposal that could accommodate SWEPCO.

ARM also supported reducing the period for averaging forward 12-month gas prices to five days rather than the 60-days originally proposed in the rule. AEP stated that the shorter time period would be more conducive to properly managing risk. Also, ARM stated that the materiality threshold should be significantly lower than 10%. Affiliated REPs are already collared by the fact that they may only request two adjustments per year. ARM agreed conceptually with TXU REP's "failsafe" provision although it suggested that the details of the provision need additional refinement. Specifically, ARM expressed concern about the "RFP process", the wholesale product that would be solicited, and whether $5/MWh would provide sufficient headroom.

Entergy REP condoned the use of the capacity auction as a proxy for electric prices during 2003, allowing for the flexibility to use the auction prices in 2004 if an appropriate electric index is not available at that time, and including a "fail-safe" provision. Entergy REP also supported a reduction in the materiality provision from 10% to 4.0% and the shortened trading period for calculating the natural gas index price.

AEP supported the fundamental structure of TXU REP's phase-in compromise. Until a working and reliable purchased power index is operating within ERCOT, AEP stated that it would support use of the natural gas price index for adjustment of the fuel factor. In the event that the fuel indexing mechanism does not properly reflect the market, a fail-safe mechanism should not only adjust the PTB but should also ensure that customers of utilities without stranded costs continue to receive the benefits of the 6.0% PTB rate reduction and ensure that customers of these utilities are not harmed by competition. AEP proposed to adjust the PTB when market prices increase at a rate greater than the natural gas price index or future wholesale energy price index. AEP's concern was that such increases would prevent competition from taking place and prevent the affiliated REP from recovering its wholesale energy costs.

Consumer Commenters did not agree with TXU REP's proposal. Consumer Commenters objected to a pass through of some type of market-based electricity price. They stated that the legislation was passed with the assumption that the price to beat would be above the retail price, that the market price would be much lower. Therefore, Consumer Commenters stated that the legislation does not really give the commission the tools it needs to deal with a different type of market. If there is a problem that needs to be addressed about the market not turning out the way it was expected, then Consumer Commenters suggested such problems be addressed openly and perhaps even through legislation rather than trying to patch something together under the price to beat rule.

OPC commented that it is unreasonable for the commission to state in advance that a price index will be adopted, without any knowledge of the markets or publicly available market indices that may exist in the future. Stating in advance that an index will be adopted, even though considerable debate may arise over the adequacy of the market index, seems to predispose the commission to adopting some type of power cost index even if it is potentially subject to manipulation. OPC argued that the commission should defer the decision on whether it will change the PTB adjustment mechanism until 2004.

OPC stated that it would be willing to support a reasonable "fail-safe" proposal but objected to TXU REP's PTB "headroom" calculation because it doesn't examine the actual financial integrity of the REP, violates PURA §39.202(p), and brings the other parts of the price to beat, such as T&D rates and competition transition charges (CTCs) into the calculation. OPC expressed concern over other problems including the multiple price to beat rates each REP has and the resulting possibility of inter-class subsidies, as well as the failure to link the $5/Mwh target for a REP's margin to actual costs. If a headroom standard is to be used, it should be based on the adequacy of the generation component of the PTB plus the fuel adjustment relative to alternative measures of power costs.

OPC's alternative proposal developed very general standards for an affiliated REP to request a "fail safe" exception with the applicant bearing the burden of proof. The affiliated REP would have to show that its actual incurred power costs were reasonably incurred, reflected prudent diversification and hedging and that, despite the affiliate REP's best efforts, the level of such costs continue to exceed the generation component of the price to beat, as adjusted by the fuel factor.

Cities stated that TXU REP's proposals to phase in market-based indexing are likely to result in the erosion of PTB protection and in excess profits for utilities. Initially, an excess of capacity would hold down prices but the utilities will be protected from fuel cost increases and insulated from the low capacity utilization. Cities stated that the PTB already protects utilities from the risk of low capacity charges, since it includes recovery of costs that might otherwise be stranded as a result of transitory excess capacity. If initial capacity charges are low, stranded cost associated with sales to customers not taking PTB service will be recovered in the true up. Cities added if the true up of ECOM produces stranded cost, PTB customers are subject to possible double recovery.

Cities commented that TXU REP's proposed transitioning of the fuel factor adjustment from gas prices to market prices would maximize the potential for profit. During the first years, the natural gas price index would protect utilities from cost increases while low capacity utilization raises potential stranded costs. Later, the market-price based changes would protect the affiliated REP from higher power prices while the affiliated PGC is reaping the profits from those higher prices, Cities concluded.

Cities' stated that if the Legislature had intended a $5 per MWh floor on headroom, SB 7 could have been written to provide such a floor. Cities recommended that if any headroom floor is approved, it should be designated as both a ceiling and a floor. However, Cities' argued that creation of headroom should not be used to undermine the price reductions that SB 7 and PURA §39.202 provide. Cities noted that to the extent a headroom problem is expected to exist at market opening, the origin of the problem is inflated utility claims regarding T&D revenue requirements, transition costs and stranded costs. The lack of headroom demonstrates that the economics of serving PTB customers make it unlikely that these customers will benefit from competition. It is illogical to remedy this problem by increasing the PTB to a level that exceeds the rate that these customers would have paid with continued regulation in order that they can "benefit" from competition.

Several parties stated that the liquidity of the market index should also be an issue. Reliant offered the following working definition of liquidity: when transactions by a single party do not result in a change in market conditions such as price or bid/ask spread. Unfortunately, liquidity remains a subjective measure, notwithstanding this working definition, because there is no directly observable measure of liquidity. Therefore Reliant suggested that the better question is whether a given index is indicative of true market prices. Reliant argued that indicativeness can be assumed if the product underlying the index is accessible by any interested party, the product underlying the index can be arbitraged by those parties, and the market for the product underlying the index is broad enough to interest both buyers and sellers.

Reliant concluded if these conditions exist, it would be too costly for any participant to manipulate the market index. Both the 5 x 16 purchased energy auction originally proposed by Reliant Energy as well as the capacity auction for the 7 x 24 product meet these requirements for market indicators, according to Reliant. The volume of trades that will be generated through the capacity auctions, the inability of affiliates to participate, and the use of the auction for the ECOM true-up all argue against the possibility of manipulation of an index based on these capacity auctions.

Entergy REP expressed concern about using the NYMEX electricity forward market to index the PTB because of the potential immaturity and illiquid nature of the NYMEX electricity forward market. This concern arises due to the current low, even zero, volume of the NYMEX "Into Energy" index and the large spread between bid and ask prices in over-the-counter trading. Entergy REP stated that there is no single quantitative measure sufficient to determine the existence of a competitive, well-functioning, and liquid electricity market. Rather, according to Entergy REP, there are a number of qualitative characteristics that should be examined including, but not limited to, the following: trading volumes on a NYMEX-type forward market; volume of trading; bid-ask spreads in over-the-counter trading as reported in sources such as *Power Markets Weekly*, and consistency between the capacity auction prices and the forward markets.

Affiliated REPs expressed concern over their ability to hedge properly under certain proposals. TXU REP also stated that it had concerns about its hedging ability when there was a 60-day period over which it would be required to average gas prices. The TXU traders reportedly believe that the rule should move to something more near term to allow the traders and all the various companies the ability to hedge gas prices. TXU REP suggested five days, although it admitted that five days might not be the perfect number.

AEP responded that its central issue was the importance of the ability to hedge. An expert from AEP stated that all of the proposed models of the price to beat do not propose hedging for the price to beat because the company will not have knowledge of what the customer base is. AEP was concerned that they currently manage the system day to day and that there are considerable vagaries that the company has come to live with. For example, the load may be higher due to weather, the loss of units effectively changes the average or marginal costs, and what goes on outside of Texas affects the cost of power in Texas. AEP stated that it currently tries to mitigate these on a daily basis and as long as the costs are shown to be prudent, they have been protected. AEP proposed that the commission provide some type of safety net for the affiliated REP that would allow it to hedge a percentage that would be protected by the commission up to that point.

Reliant pointed out that there is no fundamental value created by longer-term purchases versus spot purchases. Financial theory holds that forward electric prices represent the expected value of future spot price distributions, with each price discounted appropriately for risk. Thus, according to Reliant, hedging cannot create value in isolation. However, since REPs will operate with low margins, some level of hedging is likely in order to prevent excessive earnings volatility. On the other hand, hedging is also costly. Even with forward purchases the REP is likely to lose margin due to the bid/ask spread. Purchasing options to account for the unknown number of customers and their volumes would also be expensive, particularly for summer volumes, according to Reliant. In summary, Reliant contended that it is unlikely that long-term contracting will lead to lower costs to customers. It would, however, limit price volatility to customers and lower earnings volatility for the REP.

Reliant asserted that use of a one-day price would not increase volatility significantly, but would allow commercial hedging to take

place. TXU REP stated that the company is putting rules in place to employ short, medium, and long-term contracts to keep costs low.

TNMP pointed out that regardless of the index used to track changes in energy costs, it will not account for changes in energy prices attributable to ERCOT assessed fees. TNMP argued that the rule should incorporate an adjustment mechanism to reflect significant changes in the ERCOT assessed fees including independent system operator (ISO) transaction fees, unaccounted for energy fees, congestion management fees, and others. Consumer Commenters expressed concern about the levels of these fees and concluded that the fees should not be automatically included in the fuel factor, but be subject to review and approval by the commission.

Those parties who argued for power cost indices, OPC commented, ignore the legislative policy for creating the price to beat. OPC explained that the legislative policy for the price to beat is to provide a safe haven for residential and small commercial customers from any adverse impacts of competition that might arise during the transition period. The use of a fuel factor mechanism for adjustments, OPC explained, indicates that PTB customers would not face any consequences greater than under a regulated cost of service rate. OPC reasoned that the Legislature was aware that this provision placed risks on the affiliated REP, which no longer owned generation. OPC contended that the affiliated REP is required to absorb that risk unless it becomes so onerous that an adjustment to the PTB needs to be requested on financial integrity grounds.

The commission first notes that notwithstanding the comments of certain parties in this rulemaking, none of the proposals considered by the commission should result in Texas experiencing the problems experienced in California over the past 12 months. Even if the fuel factor adjustments were tied to a 12 month forward electricity price, the fact remains that it is only the fuel factor portion of the price to beat that can be adjusted, and even that portion can be adjusted no more than twice per year. As a result, the monthly pass-through of average spot market prices (as occurred for San Diego Gas and Electric customers) cannot occur in Texas while there is price to beat protection. Conversely, under no circumstance is the price to beat the "hard" rate cap under which PG&E and Southern California Electric were forced to operate. Even the sole use of a gas price index would allow the price to beat to be adjusted for changing market conditions. Additionally, while the commission hopes the provision is never needed, the ability to raise the price to beat for financial integrity reasons under PURA §39.202(p) also provides protection against a significant divergence in wholesale and retail prices.

The commission concludes that it is appropriate to ensure that headroom under an affiliated REP's price to beat remains no worse than where it initially exists, positive or negative. In other words, to the extent an affiliated REP's price to beat is initially above market, a determination should be made for the headroom that exists on January 1, 2002, and if that headroom were to shrink, the affiliated REP would be able to request a change in the fuel factor sufficient to restore the initial headroom. Alternatively, if the price to beat were initially below market, if market prices of electricity rose such that the price to beat became further below market, the affiliated REP could request an increase in the fuel factor sufficient to return the price to beat to where it started. In both cases, headroom could of course increase if market prices fell, but an affiliated REP could keep headroom from becoming worse. However, to the extent that the price to beat remains significantly below market for a sustained period of time, competition will likely not develop before the expiration of the price to beat period, and it may be likely that an affiliated REP will need to also request a change in the price to beat due to financial integrity issues.

Under this approach, the commission concludes that the market price of electricity to be used for determining the initial/benchmark level of headroom and to permit adjustments should be as follows an average of the prices resulting from a three-year RFP and one year capacity entitlement strips. Under this proposal, affiliated REPs would file the results of a three-year RFP at the end of 2001, near the time of the setting of the initial price to beat fuel factors. Affiliated REPs would then be able to subsequently file RFP results to justify an adjustment to the price to beat to restore the initial amounts of headroom. The capacity auction prices used will be from the initial capacity auctions that will be conducted in September 2001. The commission concludes that it is most appropriate to use the prices for the baseload products that would be needed to serve PTB load. This is similar to the TXU REP proposal and reflects the fact that the capacity auctions will occur frequently during the course of the price to beat period, and that the baseload product will have the largest number of entitlements auctioned. Affiliated REPs will then be able to use the most recent auction of one year-forward strips of auction products, or the most recent aggregated forward 12 months of products to justify a change to the fuel factor.

Use of an average of a three year RFP and the capacity auction prices will allow changes in the PTB due to the average change in wholesale market prices over two different terms. Therefore, to the extent the prices of three-year terms are less volatile than the prices of one-year forwards, use of the average will reflect the commission's belief that it is appropriate for REPs to contract for a variety of different terms of power in order to hedge against market volatility. This approach will require affiliated REPs filing the results of a three-year RFP in late 2001 to calculate the benchmark/initial headroom figure.

The commission concludes that this approach provides the most consistency with the statutory language of PURA §39.202(l), which allows for adjustments to the fuel factor upon a showing that the fuel factor does not reflect significant changes in market prices. The commission shares the concerns raised by a number of commenters that recent increases in the price of natural gas and purchased power may make it difficult for non-affiliated REPs to compete during 2002, even at the levels of shopping credits anticipated by staff. The commission agrees that it is critical that the initial price to beat fuel factor be set as accurately as possible, but disagrees with any assertions that the fuel factor should reflect anything other than the historic fuel mix of the integrated utility, as this is how the fuel factor would have been set under continuing regulation (with allowance for that fuel mix to change as the utility's portfolio changes).

However, the commission also recognizes the undeniable fact that REPs, affiliated or not, will not incur costs after 2002 based on a historic fuel mix; rather, all REPs will be purchasing power in the market. As such, using a measure of the forward market price for electricity at or near the time of the final setting of the initial price to beat fuel factor to establish a benchmark for headroom appropriately reflects the fact that the price to beat may initially be above market in some areas, and below market in others. To the extent that any subsequent changes in market prices cause that headroom to shrink, disappear, or become even more

negative, such changes represent significant changes in market conditions that will not be reflected in the setting of the initial fuel factor. Therefore, in accordance with PURA §39.202(l), a change to that fuel factor is warranted. To the extent headroom is initially insufficient to allow non-affiliated REPs to compete for price to beat customers in a particular area, competition will clearly not take hold until the market price of generation falls. However, the commission concludes that maintaining at least the initial level of headroom is fully consistent with the intent of SB 7 that the price to beat serve as a protection for customers while still fostering the growth of a robust competitive retail market.

The rule has been revised to incorporate the changes discussed above. Specifically, two new terms, "headroom" and "representative power price", have been added to the definitions section of the rule. Headroom is defined in the rule as the difference between the average price to beat and the sum of the non-bypassable charges approved by the commission in the pending unbundled cost of service (UCOS) cases. This definition requires a headroom calculation for an average residential and small commercial customer. The term "representative power price" is defined as the simple average of the RFP for 10% of the PTB load for three years and the price resulting from the baseload capacity entitlements in the capacity auctions, using the most recent auction of a 12-month forward strip or the most recent aggregated forward 12-month entitlement. It should be noted that the "representative power price" is not indicative of the true cost to serve a price to beat customer, but instead is simply the blend of power prices that are to be used to gauge how prices are changing in the marketplace.

Subsection (f)(3)(D) has been revised to require affiliated REPs to file information in October 2001 to establish the initial headroom that exists as a result of the initial fuel factor established in October 2001.

Subsection (g)(1)(E) has been revised to permit the affiliated REP to request an adjustment to the fuel factor if the representative power price has changed such that headroom under the PTB has decreased and the adjustment is necessary to restore the amount of headroom established by the commission in the initial fuel factor.

Language has also been added in subsection (g)(1)(C) and (g)(1)(E) to ensure that each subsequent adjustment to the fuel factor is based on the gas prices used at the time of the previous adjustment, if the adjustment is made due to changes in the averaged forward gas price.

The commission further disagrees with Consumer Commenters and others who suggest that the establishment and subsequent adjustment of fuel factors under PURA §39.202 must be applied as it is today and that any change in the fuel factor may only be made in a fuel reconciliation proceeding. PURA §39.202 does not contain any such limitation. Section 39.202 provides that the fuel factor may only be changed twice a year and only in order to reflect significant changes in the price of natural gas and purchased energy. The rule as adopted includes reasonable procedures for adjusting the fuel factor.

The commission also disagrees with the Cities' suggestion to make fuel surcharges temporary. While PURA apparently does not prohibit the commission from imposing this requirement, the commission concludes that such a limitation is unreasonable and unnecessary. The fact that affiliated REPs may only request fuel factor changes twice per year together with the materiality threshold of §25.41(g)(1) should guard against unnecessary fuel factor adjustments. Section 39.202(l) clearly provides for adjustments to the fuel factor based on significant changes in the price of natural gas and purchased energy and affiliated REPs. It is reasonable to allow such adjustments to remain in effect until the next commission approved adjustment. Additionally, this proposal would introduce an added layer of price uncertainty into the market. Finally, the commission concludes that the fuel factor under the price to beat may be adjusted up or down, which should provide a measure of protection for price to beat customers. If affiliated REPs fail to timely request a downward adjustment in the fuel factor, affected customers will presumably seek service from another provider. Additionally, PURA §39.262(e) recognizes the reality that the price to beat may be an above market rate, and requires an offset to the final stranded cost determination to reconcile the amount above market that price to beat customers will pay if they remain with the affiliated REP.

The commission disagrees with Cities and others that the fuel factor adjustment should be only applied to the portion of the historical fuel factor that consists of gas-fired generation or purchased energy. Beyond 2002, the market price of generation will likely be set by gas-fired generation, and as such, it is appropriate to apply the changes in the market price of natural gas and purchased energy to the entire fuel factor in order to maintain the level of headroom in the price to beat.

Furthermore, the commission finds that it is appropriate, after a sufficiently liquid electricity commodity index has developed in an affiliated REP's power region, and the power generation company affiliated with the affiliated REP has finalized their stranded cost determination and non-bypassable charges or credits, as appropriate, to allow affiliated REPs to request a change to its fuel factor in order to reflect changes in the price of purchased energy indicated by this index. The commission finds that it is not appropriate to move to such an index until the stranded costs of the affiliated PGC are finalized as any stranded cost charges (or credits to return prior stranded cost collection) will not be finalized until stranded costs are finalized. At that time, if the price to beat for an affiliated REP is in danger of being below market because of high market prices for generation, the return of any excess mitigation, or negative stranded costs if the commission determines that it has the authority to require the return of negative stranded costs, can be used to address concerns about headroom, and thereby mitigate the effects of high market prices on price to beat customers. Subsection (g)(1)(F) has been added to allow for this transition and prescribes these preconditions and the method by which an affiliated REP must transition to the use of an electricity index.

Question 3: In the provisions of paragraph (g)(1), is 10% the appropriate threshold for an adjustment to the fuel factors? If an index other than NYMEX natural gas prices is ultimately chosen by the commission, what threshold would be appropriate for that index?

Entergy REP stated that in general, a 10% threshold that uses NYMEX gas prices is appropriate. Entergy REP recommended that the adjustment threshold be based on the rate of change of the NYMEX gas contract versus a baseline NYMEX gas contract price and that the gas portion of the baseline price to beat should be adjusted in cases where the threshold is reached and a requested change in the fuel factor is made. However, Entergy REP concluded that due to potential exposure to the affiliated REP at price to beat levels that are less than the 10% threshold, the affiliated REP should also have an opportunity to demonstrate to the commission that a change in the market price

of purchased power/gas is significant even if the 10% threshold has not been met. In reply comments Entergy REP altered its position in favor of a 4.0% threshold.

Several affiliated REPs expressed concern that the 10% factor was too high or that a set factor was unnecessary. Reliant, TXU REP, and AEP concluded that a fuel factor adjustment threshold is unnecessary. TXU REP stated that the 10% threshold is too high, particularly since affiliated REPs are limited to only two opportunities per year to seek fuel adjustments. TXU REP stated that under current commission rules utilities are allowed to revise their fuel factors twice a year and are required to petition the commission to refund or surcharge if they have materially over or under-collected fuel expenses, with the materiality threshold being defined as 4.0% of annual estimated fuel costs. TXU REP pointed out that the significant difference between the proposed rule and existing fuel factor provisions is that the current process allows a utility to request a refund or surcharge if its fixed fuel factor has materially over or under- collected its fuel expenses. Since the proposed rule contains no surcharge mechanism, if fuel prices increase, an affiliated REP bears all the costs associated with the difference between its fixed fuel factor and the cost of the power it buys, because a fuel factor adjustment only provides a remedy going forward. Therefore TXU REP recommended that the proposed rule be amended to permit an affiliated REP to request no more than two fuel factor changes each year without any minimum materiality threshold. TXU REP argued that the commission should consider the rate shock that customers would experience if rates were held steady until a 10% or greater change in fuel prices occurred, at which time the entire increase would be added to the customers' bills. Reliant stated that the 10% threshold is far too large, especially when contrasted with the 4.0% threshold under the current fuel rule.

TNMP urged the commission to adopt a materiality threshold of 4.0%, stating that a materiality threshold of 10% is unnecessarily high and that the result of imposing this high materiality threshold would be to force affiliated REPs to maintain prices that are not warranted by the market cost of energy.

TNMP also expressed concern that the procedural schedule under this process could take as long as 135 days, which could result in additional disparities. SPS suggested that the appropriate threshold level to use in adjusting the fuel factors will be dependent on the level of headroom available in the final price to beat rates. However, the level of headroom won't be known until the unbundled delivery rates and final price to beat rates are established. SPS reasoned that if headroom is significantly squeezed, then the proposed 10% threshold is too high and a lower threshold may be more appropriate.

TNMP and Entergy REP both argued that 4.0% would be a more appropriate threshold. TNMP stated that some commenters incorrectly assumed that the affiliated REP would never seek to lower the price to beat. TNMP asserted that if market prices decrease significantly, the affiliated REP will either lower its prices or expose itself to competitive disadvantage.

The Coalition proposed a "safe harbor" where any affiliated REP meeting the criterion (lesser of 4.0% of the index or $40 million in lost headroom over an annualized period) should be automatically allowed an adjustment as calculated under Reliant's proposed adjustment.

OPC stated that reliance upon the 4.0% threshold is misplaced for two reasons. First, OPC argued that the 4.0% threshold in the existing fuel rule exists in a reconcilable fuel cost regime where over-recoveries will be returned to ratepayers. Secondly, OPC reasoned the denominator of the 4.0% threshold in the current fuel rule is based upon the total fuel balance including nuclear and coal.

Consumer Commenters and OPC both contended that if the commission adopts a materiality threshold it should be greater than 10%. Consumer Commenters stated that the rule should not specify a materiality threshold and should not allow an affiliated REP to change the fuel cost factor based on an index. All fuel costs must be reviewed Consumer Commenters stated, to assure that higher costs in one category are not offset by declining costs in another category. Consumer Commenters added that the rule should specifically state that the commission or other parties have the right to request to have the fuel factor lowered to reflect market prices. Consumer Commenters concluded that the materiality threshold for defining "significant" should be higher than 10%, and that "significant" changes should be substantial and long term, especially since they are not subject to reconciliation under the proposed rule. OPC did not believe that 10% would be an appropriate threshold if it is assumed that neither the commission nor any other interested party may request a downward adjustment. OPC concluded that in the absence of additional information about which index is chosen, a threshold of 15-20% would be more reasonable without regard to whether the index is based on gas or purchased power.

AEP suggested that in lieu of a threshold factor, the use of some combination of a more continual adjustment (i.e., quarterly) of the price to beat with market prices coupled with deferred accounting treatment of the losses or gains associated with the affiliated REP's changing supply costs.

ARM expressed concerned about whether non-affiliated REPs will have sufficient notice prior to a change in fuel factor. To the extent that non-affiliated REPs offer products that are a percentage discount off of the PTB, those REPs will need sufficient advance notice to make the corresponding change in their rates. ARM suggested two options for ensuring sufficient notice would be to establish a predetermined schedule for affiliated REPs to file for fuel factor changes, such as designated time periods in the spring and fall, as is being done to set the initial fuel factor. Another option would be to require a 30-day notice period prior to any change in fuel factor.

Based on the comments received, the commission concludes that a 4.0% materiality threshold is reasonable. The commission disagrees with those commenters suggesting that there be no materiality threshold. PURA §39.202(l) specifies that PTB fuel factors may be adjusted for "*significant* changes in the market price of natural gas and purchased energy...." (emphasis added). Use of the term "significant" indicates that some sort of threshold be demonstrated in order to justify an adjustment under §39.202(l). On the other end of the spectrum, the commission disagrees with OPC and Consumer Commenters who suggested a threshold in excess of 10%. While some materiality threshold is appropriate, it should not be excessive. If the threshold is set too high, affiliated REPs will be unable to meet it without first incurring significant losses. The commission believes such a result is contrary to the intent of PURA §39.202.

The commission concludes that a 4.0% materiality threshold is reasonable because such a threshold is analagous to the existing materiality threshold in the current fuel rule. While the commission recognizes that the current 4.0% threshold is based on the current solid fuel and gas mix of the integrated utility, in a competitive market, the market clearing price of purchased

power will be set by the marginal unit in the market, which will most likely be a combined-cycle gas turbine.

Question 4: In light of the seasonal fuel factors proposed by subsection (f)(3), is the minimum contract term established in proposed PUC Substantive Rule §25.477 (a)(8) (published in the September 1, 2000, Texas Register at 25 TexReg 8554) an appropriate or necessary mechanism to discourage customers from gaming the affiliate REP's price to beat rates?

Although commenters acknowledged that the commission has rejected minimum term requirements in the customer protection rulemaking (see 26 TexReg 125 (January 5, 2001)), many addressed this issue again in this rule to support the use of minimum term requirements. Entergy REP offered comments about the importance of permitting affiliate REPs to require returning customers to agree to minimum term contracts. Entergy REP stated that anti-gaming provisions are necessary to ensure a robust, competitive market and to protect the price to beat supplier from undue risk. Entergy REP commented that the proposed rule's treatment of the fuel factor may not adequately allow the seasonal market value of wholesale electric energy to be reflected in the price to beat. Entergy REP commented that utility fuel factors are cost-based and do not necessarily track competitive market electricity prices. To mitigate risk to the price to beat provider, Entergy REP maintained that minimum contract terms of 12 months or other anti-gaming provisions are appropriate for price to beat customers who seek to return to price to beat service after receiving service from a competitive REP.

EPE stated that affiliated REPs are prohibited from including a term of service in agreements with residential and small commercial customers whereas non-affiliated REPs do not have this same prohibition. EPE recommended that all REPs be placed on equal footing in this regard and be given the discretion to use minimum contract terms in a non-discriminatory manner. SPS, TNMP and AEP also supported the use of minimum contract terms. SPS stated that a minimum contract term for price to beat customers returning to the affiliated REP was necessary because requiring the customer to remain for a minimum term helps the REP ensure that any monthly imbalances between volatile costs and non-volatile revenues will balance out over the year. AEP strongly supported a one-year minimum contract term regardless of the length/nature of past customer relationships.

AEP and Reliant argued that the prohibition on minimum contract terms for small commercial customers violates the cost allocation principles underlying commercial rates that have minimum terms. AEP supported the revision of this prohibition to take into account commercial rates that currently have minimum terms. TXU REP commented that large commercial customers should be required to fulfill any contractual service obligations they have to their existing retail electric provider before being able to return to the price to beat rates. Entergy REP concurred with TXU REP on this point.

Reliant proposed mechanisms to discourage customers from gaming the system. These proposals are addressed above in Question 1. Consumer Commenters opposed Reliant's plan that required a customer returning to the price to beat to choose either a seasonal rate rider or balanced billing with an additional deposit. Consumer Commenters suggested the proposal be rejected as it is inconsistent with SB 7 and punishes the consumer for exercising a right that is provided by law.

TXU REP stated that the commission in more than one rulemaking proceeding has acknowledged a need to develop mechanisms to prevent the kind of gaming that has occurred in other states where the retail markets have already opened to competition. TXU REP concluded that seasonal fuel factors should not be applied to all customers to prevent gaming because of the harsh rate impact they will have on customers, particularly residential customers, during the summer months. TXU REP also perceived that significant gaming by residential and small business customers appears less likely, in large part because of mechanisms employed in rules like those governing aggregation, provider of last resort (POLR) and customer protection.

TXU REP proposed a solution that focuses on commercial customers with peak demands greater than 50 kW but less than 1000 kW. TXU REP reported that its discussions with Pennsylvania market experts indicated this customer group has contributed to the gaming problems in Pennsylvania. TXU REP determined that these customers have the greatest ability to game the affiliated REP's price to beat, as they are able to assess available pricing options and to unfairly manipulate the system to choose the most favorable combination of market-based and semi-regulated rates. In lieu of the seasonal fuel factor mechanism, TXU REP proposed to give commercial customers over 50 kW two choices when they return to the affiliated REP: (1) accept service at the price to beat with a one-year term or (2) accept a price to beat rate under a seasonal adjustment mechanism (SAM) rider. Under TXU REP's proposal the SAM rider would be a market price curve, reflecting on a monthly basis, the difference between the price to beat and the affiliated REP's cost to purchase electricity. TXU REP contended that a provision should also be added to the rule to prohibit REPs, aggregators, and agents from gaming the price to beat by providing incentives or inducements for customers to switch to the affiliated REP and to provide penalties for violations.

AEP and Entergy REP commented that seasonal fuel factors alone are inadequate to prevent gaming. Entergy REP stated that TXU REP's claim that seasonal fuel factors are unnecessary for small commercial customers is unsupported. TXU REP fails to mention, Entergy REP reported, that the Pennsylvania Commission had to intervene when a competitive supplier publicly threatened to dump 48,000 residential customers back to price capped service due to high summer prices. The resulting rule in Pennsylvania required a returning residential customer to stay for a year at a fixed rate or choose a monthly market price rate. Entergy REP concluded that the actions in Pennsylvania suggest that anti-gaming concerns are valid as applied to small commercial customers and their suppliers, and emphasize the need for seasonal fuel factors to address these concerns.

AEP noted the problems in Pennsylvania and other states where gaming has occurred. AEP stated that while it believes that gaming provisions should be directed at larger, more sophisticated commercial customers, it believes that small commercial customers are equally capable of "gaming" with more serious consequences, as the profit margins are smaller. AEP stated its support for the adoption of each of the following methods as a legitimate means to prevent gaming: (1) requiring customers returning to the price to beat to remain for one year; (2) prohibiting competitive REPs from making offers that directly or indirectly seek to game short- term discrepancies; (3) seasonal price to beat rate riders for returning customers; and (4) the opportunity for an affiliated REP to require a deposit to cover a balanced billing subsidy.

Shell stated that TXU REP's initial comments on gaming missed the point, which is that accurate pricing of default service is necessary whether or not gaming occurs. Shell argued that if the price to beat is set artificially below the real cost of power, competitors would never be able to offer lower rates to induce customers to switch suppliers. While that result may serve TXU REP's interest in maintaining its role as a monopoly provider, Shell commented, it does not serve the legislative policy and purpose of SB 7.

Reliant pointed out that its proposal is slightly different from TXU REP's. Reliant stated that small commercial customers with a peak demand of less than or equal to 50 kW and all returning residential customers should be subject to no requirements other than those in the proposed rule. However, there should be a way to remove the incentive for aggregators and REPs to offer incentives or inducements for customers to switch. Reliant and the Coalition recommended that there be incentives to prohibit the REP and aggregator from serving as switching agents for the customers whereby they could effectuate a switch without further notice to the customer. The penalties, Reliant suggested should include a mandatory repayment to the affiliated REP of all additional costs as a result of improper gaming plus administrative penalties and the discretionary revocation of REP and aggregator certificates. Further Reliant proposed that affiliated REPs have the right to investigate when they believe gaming by an aggregator or REP is occurring or has occurred.

TXU REP stated that residential and small commercial customers are unlikely to engage in gaming of the price to beat rates and that the imposition of seasonally adjusted prices on these customers is a solution for a problem that does not exist. The Cities and Consumer Commenters agreed. Consumer Commenters reiterated that residential customers practically cannot and do not game the system, and gaming in other states has been done by large customers and REPs who dump their customers.

TXU REP also proposed and supported another mechanism to minimize the risk of system gaming without preventing customers who wish to return to the status quo from doing so. TXU REP's alternative proposal stated that all non-residential customers with a peak demand greater than 50 kW that return to the affiliated REP on or after April 1 of any given year must agree to pay the net cost of service for the period of May through October of that year. The affiliated REP would track the amount of energy delivered to these customers, the price these customers actually pay the affiliated REP and the affiliated REP's cost to purchase energy for these customers (price in the balancing market). TXU REP stated that this information would be used to calculate a running account balance with these customers, if one of these customers switches away from the affiliated REP before the account balance becomes zero, then the customer must reimburse the affiliated REP for the account balance at the time of the switch. TXU REP argued that this proposal should eliminate the incentive for large customers to game the system and would allow other REPs to compete for these customers by paying the customer's exit fee themselves.

Consumer Commenters agreed with TXU REP that the actual "gamers" should be punished. While the Consumer Commenters agreed with TXU REP's proposal they clarified that they wanted to ensure that small customers who might succumb to inducement by REPs or aggregators should not be punished.

TNMP stated that absent a protective mechanism, a competing REP could undercut the affiliated REP's higher summer seasonal price to beat and drain off the affiliated REP's customers during the more lucrative summer season. TNMP further noted that by simply holding its price constant, the competing REP could shed those same customers back to the affiliated REP during the less lucrative winter period, when the price to beat drops below the competing REP's price, as dictated by the seasonal adjustment. TNMP proposed two mechanisms to address the potential for gaming. First, TNMP stated that the proposed rule should allow the affiliated REP to respond to the appearance of gaming by quickly changing the seasonal differentiation in the factors without changing the overall revenues received under the factors. TNMP argued that the affiliated REP should necessarily be able to implement this type of adjustment to the differential more quickly than the regular adjustments to the overall factors in order to impact the gaming in the season it occurs. Secondly, TNMP argued that the commission could lessen the problem in the first instance by using three seasonal factors instead of two. TNMP suggested the following three seasonal factors: December-March, April-July and August-November. TNMP concluded that these three factors should provide a smaller differential change in each factor because the summer peak months are divided and combined with more moderate usage months which provides customers with less incentive to game the system.

Cities, Shell, ARM, OPC, and Consumer Commenters opposed use of a minimum contract term. Shell stated that forcing customers to accept a minimum term for statutory default service would discourage participation in the competitive market and would be inconsistent with the customer choice initiatives in PURA. Shell supported adjusting the fuel factor so that the price to beat would reflect significant changes in the cost of power. ARM echoed Shell by stating that allowing the affiliated REPs to tie up customers under annual contracts would significantly undermine competition. ARM stated that under the utilities' proposal of forcing returning price to beat customers to a one year term, not only would the affiliated REPs have all the customers who have not chosen another supplier at market opening, they would also be able to make returning price to beat customers unavailable to competing REPs for a year. ARM stated that a more preferable market based solution would be to incorporate seasonality in the price to beat.

Cities, Consumer Commenters and OPC commented that they do not foresee a propensity for residential and small commercial customers to game the system. Cities stated that unless and until the commission determines a prevalence of residential customers gaming the PTB for financial advantage during high cost months, that any term limits the commission may devise should only apply to industrial and commercial customers. OPC stated that the summer/winter gaming problem is more likely to arise in the context of non-PTB large commercial/industrial customers who have sophisticated metering and energy management strategies. Consumer Commenters added that if returning to the price to beat because a customer is dissatisfied with higher prices or poor service is "gaming" then that is exactly what the Legislature intended. OPC argued that the five-year offering of the price to beat by the affiliated REP was intended to provide a long term safety net for small customers. ARM agreed with the these commenters that it would be anti-competitive to require returning price to beat customers to accept a minimum term contract as no other deregulated industry such as banking or telecom has these requirements. Limiting customer's right to

choose in this manner is contrary to the purpose of SB 7, ARM argued.

The commission disagrees with those commenters suggesting various penalties (i.e., minimum contract terms, seasonal rates applied only to returning to customers, and other monetary penalties) to be applied to returning price to beat customers as a means of preventing gaming. As discussed previously in response to preamble Question 1 above, the commission is concerned that imposition of such restrictions would discourage customers from ever leaving their incumbent providers and thereby thwart development of a competitive market. The commission seeks to discourage gaming of the price to beat by either customers or REPs. One way to address gaming is through the use of seasonal fuel factors. For reasons discussed previously in response to Question 1 above, the commission has concluded that use of seasonal fuel factors for small commercial customers should be the only remedy for affiliated REPs who are concerned about gaming. The commission agrees with those commenters suggesting that REPs and aggregators be prohibited from serving as switching agents for the customers whereby they could effectuate a switch without further notice to the customer.

However, the commission notes that Substantive Rule §25.482 of this title (relating to Termination of Contract) provides that customers who have their contract terminated by their REP, or are abandoned by their REP, are required to be notified that they can select an alternate REP or be switched to the POLR. Furthermore, Substantive Rule §25.474 of this title (relating to Selection or Change of Retail Electric Provider) outlines the procedures for a REP to switch a customer to their service and addresses penalties for unauthorized switches. As such, the commission does not believe that the opportunity exists for REPs to serve as a switching agent for customers or to transfer a large number of customers to the affiliated REP without the affiliated REP's consent, unless the affiliated REP is serving as the POLR at the price to beat.

The commission has revised subsection (j) of the rule to place explicit prohibitions on non- affiliated REPs from providing incentives to encourage customers to return to the PTB. The commission also agrees with Reliant that affiliated REPs already possess the right to investigate gaming by aggregators and REPs and, if necessary, to file a complaint before the commission to address such problems. This should also reduce the potential for gaming.

Question 5: Should the commission further define what showing should be required by an affiliated REP under subsection (g)(2) to demonstrate that the affiliated REP will not be able to maintain its financial integrity under the price to beat? If so, what standard should be used in this determination?

AEP, SPS, Reliant, TXU REP, and Entergy REP commented that it is unnecessary for the commission to define what showing should be required by an affiliated REP under subsection (g)(2) to demonstrate that the affiliated REP will not be able to maintain its financial integrity under the price to beat. TXU REP and ARM commented that the definition of financial integrity has been well established by prior commission orders and appellate court decisions and that the commission can rely on these standards with respect to the issue of an affiliated REP's financial integrity in relation to its ability to provide service pursuant to the price to beat. TXU REP reasoned that it is very difficult to predict now what the market will look like in the next few years, much less what standards should be used to judge whether an affiliated REP's financial integrity is jeopardized under any particular market conditions. This is an assessment that will need to be made on a case-by-case basis, TXU REP reported, relying on information that may potentially be competitively sensitive.

Entergy REP and TNMP commented that the financial integrity standard should be a low one. TNMP urged that the standard for an adjustment to protect the affiliated REP's financial integrity be set relatively low because PURA severely limits the commission's ability to adjust the price to beat. If the threshold for the adjustment is set too high, TNMP asserted that an affiliated REP will be pushed to the brink of financial ruin before it can obtain an adjustment and would then operate prospectively on that brink. TNMP argued that no commenters offered a legal basis to require affiliated REPs disclose sensitive information. More importantly, TNMP stated that the imposition of a strict and exacting standard, while superficially pro-consumer, actually threatens long-term consumer harm, because while the affiliated REP is losing money the consumer is insulated from the market conditions.

Entergy REP stated that if the price to beat provider's financial integrity is impaired because the price to beat is set too low, then barriers to entry will be erected for prospective market entrants. Entergy REP commented that the financial integrity test should balance the affiliated REP's interest and the interest of fostering competition. AEP stated that affiliated REPs should have the flexibility to demonstrate to the commission why their particular facts and circumstances will result in their affiliate REP's inability to maintain their financial integrity under the price to beat.

OPC and Consumer Commenters commented that the standards should be strict. OPC stated that it is not necessary at this point to outline in detail the procedures that should govern such a process. However, OPC stated that regardless of when such a procedural rule is enacted, the standards and procedures for granting such requests should be very strict. OPC stated that a financial integrity criterion is meaningless unless the commission simultaneously reviews the reasonableness and efficiency of the affiliated REP's costs. OPC reasoned that because almost all of the affiliated REP's costs are likely to be payments to other affiliated entities, the affiliated transaction standards should be applied in these proceedings. For that reason, the proceedings will be extensive and time consuming and should not be undertaken except in instances of deep financial distress.

OPC suggested (and Consumer Commenters agreed) several criteria for proceedings under proposed subsection (g)(2). The first suggestion is that the relevant financial integrity test should hinge on the existence of negative cash flow, taking into account reasonable and necessary expenses. The second criteria is that the affiliated T&D utility should be required to justify its costs whenever the affiliated REP makes an application under this section. This would allow the commission to correct excessive delivery charges if that is the cause of the REP's financial distress, OPC suggested. Finally, OPC suggested that to the extent that the affiliated REP's access to capital is through the holding company, the overall impact of the REP's financial distress upon the holding company should be examined.

Consumer Commenters feared an affiliated REP may attempt to limit the financial information available to the commission and parties' to review based on claims that it is "competitively sensitive." Consumer Commenters stated that in California the utilities'

claims of financial hardship fly in the face of the substantial profits earned by the utilities' generation affiliates during the same high market period.

Reliant reiterated that it is unnecessary at this time for the commission to set up objective standards for a showing of financial hardship. Reliant disagreed with the suggestion of OPC and others that the impact of the affiliated REPs financial distress on the holding company should be looked at when determining whether the REP is experiencing financial distress. Reliant stated that this should not be used when and if standards are adopted. Reliant claimed there is no basis in either past regulation or general logic for this assertion. Integrated utilities are independent entities; other entities are not required to subsidize the utilities and the entire holding company is not required to be in financial distress before the utility can receive a rate increase.

The commission concludes that the standard for an adjustment based on financial integrity should be high. The commission agrees with TXU REP, ARM and others that the definition of financial integrity has been established by prior commission orders and appellate case law and therefore does not believe further definition of this standard is necessary at this time.

Question 6: Can the registration agent provide verification for small commercial customers similar to that described for residential customers in subsection (l)(4)(C)(i)?

ERCOT stated that if ERCOT is designated as the registration agent, it would be able to provide the commission with verification reports regarding residential and small commercial customer migration to non-affiliated REPs. AEP and OPC supported ERCOT as the registration agent. TNMP stated that the registration agent should be able to provide the information for small commercial customers. Entergy REP and SPS noted that ERCOT will not have the necessary load/use data for non-ERCOT customers.

Reliant questioned whether ERCOT, as the registration agent, could differentiate small commercial customers with peak demand below 20 kW. SPS stated that the registration agent may be able to provide verification for small commercial customers under 20 kW, but would not have the consumption data needed to verify small commercial customers over 20 kW. ERCOT stated that it could differentiate such small commercial customers.

Based on the comments received, the commission agrees with ERCOT and concludes that no change to the rule to address this question is necessary.

§25.41(b)

Consumer Commenters commented that the provisions of subsection (b) should be revised to reflect that the PTB is also intended to provide an immediate rate decrease for small consumers and to assure consumers there will be a price capped service option available for the first five years of the retail market. Consumer Commenters contend that as proposed, subsection (b) only focuses on competitors, and does not adequately reflect the protection aspect of the price to beat.

The price to beat serves a dual purpose -- to provide a rate decrease for residential and small commercial customers and to assure that these customers will have a price capped service option available for the first five years of the retail market. The commission believes that the rule as adopted properly reflects both aspects of the price to beat.

§25.41(c)

EPE commented that the provisions of proposed subsection (c)(4) should be modified to reflect the fact that EPE measures demand on a 30-minute interval. As proposed, subsection (c)(4) measures demand only on a 15-minute interval.

The commission agrees and has amended the rule to permit demand measurement on either 15 or 30-minute intervals.

EPE commented that proposed subsection (c)(5) excludes a part of the corresponding PURA provision governing price to beat. Specifically, EPE refers to PURA §39.202(n) which provides that "in a power region outside of ERCOT, *if customer choice is introduced before the requirements of Section 39.152(a) are met*, an affiliated retail electric provider shall continue to offer the price to beat to residential and small commercial customers, unless the price is changed by the commission in accordance with this chapter, until the later of 60 months after the date customer choice is introduced or the requirements of Section 39.152(a) are met." (emphasis added). As proposed, the definition of the price to beat period excludes this phrase.

The commission agrees with EPE on this point and has amended the definition of "price to beat period" accordingly.

SPS and Entergy REP both commented on the definition of small commercial customer in proposed subsection (c)(9). Both of these companies commented that the definition of small customer in the rule should be defined as "a commercial customer having a peak demand of 1,000 kilowatts or less." As proposed, the definition uses the term "non-residential retail customer".

The commission disagrees with SPS and Entergy REP. In the absence of a clear method to distinguish whether a customer is "commercial" or "industrial", the commission concludes that the intent of PURA §39.202(o) was to provide the price to beat to any customer with a peak demand of 1,000 kW or less, regardless of how that customer may otherwise be classified under a particular utility's tariff.

Cities expressed concern about non-roadway lighting and asked that the price to beat apply to non-roadway lighting. City of Dallas also expressed concerns about non-roadway outdoor security lighting and the fact that while street lighting will remain regulated, the utilities have been contacting their customers and taking a very narrow view of what regulated lighting is. City of Dallas proposed either to keep non-roadway lighting on a regulated rate or the price to beat and expand the definition of street lighting.

The commission concludes that any non-metered point of delivery with peak demand less than 1,000 kW should be considered a small commercial customer and therefore eligible for the price to beat. The commission has revised the definition of small commercial customer to incorporate this change and believes that this change addresses the Cities' concerns about lighting customers.

§25.41(d)

ARM stated that this section should be clarified to state that the 6.0% decrease does not apply to fuel and purchased power, but that the discount applies only after the entire cost of fuel and purchased power is backed out of bundled rates. TNMP expressed similar concerns. OPC argued that a calculation of the 6.0% rate reduction only upon the base rate portion of customer bills is not supported by any reasonable interpretation of SB 7. OPC quoted PURA §39.202(a), stating that its use of the word "rates" refers to any "compensation, tariff, charge, fare, toll, rental, or classification that is directly or indirectly demanded, observed, charged, or collected by a public utility" as defined in PURA §11.003. OPC

argued that the rates in effect on January 1, 1999, must include fuel charges. OPC stated that the calculation change proposed by ARM would reduce the ratepayer benefits of SB 7.

The commission disagrees with ARM and agrees with OPC. PURA §39.202(a) provides for the 6.0% discount to be applied to the average bundled rate in effect on January 1, 1999, which included a fuel factor. As specified in subsection (f)(3)(D)(iii), the fuel factors to be used at the beginning of the price to beat period will be the fuel factor in effect on January 1, 1999, reduced by 6.0%, plus the difference between the fuel factors established under subsection (f)(3)(A), (B) and (C) and the fuel factor in effect on January 1, 1999. For purposes of clarity, the reference in proposed subsection (d) to subsection (f)(3)(A) has been changed to reference subsection (f)(3)(D).

§25.41(e)

TXU REP stated that there is no need to include additional language regarding refusal of service since Substantive Rule §25.477 of this title (relating to Refusal of Electric Service) of the proposed customer protection rules already addresses this subject. Entergy REP concurs with TXU REP.

The commission agrees with TXU REP and Entergy REP and has referred to §25.477 in subsection (e) to clarify the commission's intent.

TXU REP stated that with regard to term of service requirements of subsection (e)(1) and (2), TXU REP supports the use of a term of service option for commercial customers with a peak demand greater than 50 kW in order to prevent gaming. TXU REP stated that the language relating to refusal of service should be modified to allow an affiliated REP to refuse the provision of services to a small commercial customer with a peak demand of greater than 50 kW who was served by the affiliated REP within the prior 15 months, if the applicant is unwilling to accept either a one-year term of service with the affiliated REP or a price to beat rate under a Seasonal Adjustment Mechanism rider. Entergy REP stated that the rule should be modified to require a minimum one year or some other form of anti-gaming measure for returning PTB customers in order to protect the market from the harm created by competitive suppliers dumping customers back onto PTB service during high market cost months.

Reliant suggested that in order to address the gaming problem, aggregators and REPs, and their agents, be prohibited from offering incentives for customers to switch to the affiliated REP, and prohibited from serving as switching agents for the customers, whereby the agent can effectuate switching without further notice to customers. Switches that are found to have been the result of gaming would be reversed back to the date of the switch for settlement purposes. Further, Reliant proposed that affiliated REPs should have the right to initiate an investigation when they believe gaming by an aggregator or REP is occurring or has occurred.

ARM expressed support for the provisions of subsections (e)(1) and (2)(B) that prohibit affiliated REPs from requiring service agreements for PTB customers and from providing inducements to encourage PTB customers to agree to a term of service.

For reasons discussed in response to preamble Question 4 above, the commission disagrees with those commenters suggesting the addition of a minimum term contract or different seasonal rates for customers returning to the affiliated REP. The commission concludes that such provisions would very likely discourage customers from leaving the affiliated REP in the first place and thereby unnecessarily thwart the development of the competitive market. The commission has addressed the allowed measures to address the issue of gaming in its discussion of preamble Question 4 above.

Reliant suggested language to clarify that the customer is eligible for the price to beat on a going-forward basis and that the affiliated REP would not be required to restate the past 12 months bill. Entergy REP and TNMP supported this proposal.

The commission agrees with Reliant and has made their recommended language change to subsection (e)(2)(A).

TXU REP argued that language referring to the prohibition of "inducements" to encourage customers to agree to a term of service should be eliminated because the word "inducements" is too vague and would expose the affiliated REP to an undue risk of litigation.

ARM supported the proposed language in the rule and noted that the term inducements is no more vague than the term incentives included in the statute.

The commission agrees with ARM concerns and declines to make TXU REP's requested change.

TXU REP proposed that a new section should be added to the proposed rule in order to accommodate customer choice in choosing their contracted demand level when they order new service or when they add load at an existing service location. Entergy REP agreed with TXU REP that commercial customers with contract demand in excess of 1,000 kW should be allowed to enter into delivery contracts at competitive prices. However, Entergy REP did not believe that a new subsection is necessary, referencing subsection §25.41(e)(2)(A) of the proposed rule. ARM argued that this suggestion would open the door to all sorts of abuses and should be rejected. ARM stated that it would permit a customer and an affiliated REP to get around SB 7 provisions prohibiting affiliated REPs from charging anything but the price to beat to PTB customers in their service area and that it would be very difficult for the commission to monitor such abuses.

The commission agrees with ARM and Entergy REP that the proposed language adequately defines the eligibility of small commercial customers and is consistent with PURA §39.202(o), which defines small commercial customers through their actual peak demand, not their contracted demand. No change to this section has been made.

Entergy REP commented that references to the calendar year 2001, should be revised to the 12 consecutive months ending September 30, 2001, in order to alleviate doubt as to what customers are eligible for the PTB. TNMP concurred with Entergy REP.

The commission agrees with Entergy REP and TNMP that utilizing the 12 months ending September 30, 2001, will provide necessary advance notice to existing customers as to whether or not they are eligible for the price to beat. The commission has revised the rule to reflect this recommendation.

Entergy REP stated that the rule needed to be modified in order to prevent account-splitting abuse by customers in order to qualify for the price to beat. Entergy REP suggested that a customer who is ineligible for the PTB might split his account into several smaller sub-accounts in order to become eligible for the PTB.

The commission does not foresee account splitting in order to qualify for the price to beat being a major problem because customers larger than 1000 kW of demand should have access to more attractive rates than those provided under the price to beat. Under such circumstances, these customers would not logically attempt to split their accounts in order to qualify for the price to beat. Therefore, the commission declines to alter the proposed rule as suggested by Entergy REP. However, it is the commission's intention that the term "customer" refers to a metered point of delivery. Therefore, if there are several facilities behind a single meter, it would be inappropriate for each of the facilities to be considered a separate customer. However, if there are separately metered facilities on the same site, each facility would properly be considered a price to beat customer. The commission has modified the definition of small commercial customer in subsection (c)(9) accordingly.

§25.41(f)(1)

TXU REP opposed the elimination of rates that provide discounts and incentives for customers who make permanent changes to their consumption patterns, that develop new technologies, or that promote growth in economically depressed areas. AEP supported TXU REP's proposed revision. ARM opposed this position, stating that the Legislature intended the PTB to be a "plain, vanilla rate", not a competitive alternative. ARM commented that the price to beat rule should also include a provision explicitly prohibiting affiliated REPs from selling or marketing any "special" and/or "competitive-like" kinds of electricity services to PTB customers under the PTB, unless specifically required by commission rule. ARM proposed that the words "green" and "renewable" be included in the list of rates and riders for which PTB does not apply. Entergy REP and TLSC stated that the commission should clarify the rule to insure that low- income electric customers will continue to receive rate reductions under SB 7.

TXU REP suggested that new rates be introduced by a utility between January 1, 1999 and December 31, 2001 supporting the SB 7 goal for renewable power be eligible for PTB treatment. ARM opposes this position, stating that the Legislature intended the PTB to be a "plain, vanilla rate", not a competitive alternative.

The commission finds that, in order to be consistent with PURA §39.202(a) that the price to beat is to be based on bundled rates in effect on January 1, 1999, the affiliated REP should be required to offer a price to beat rate for every rate, tariff, and service option in effect on that date. However, the commission agrees with ARM that it is inappropriate to establish a PTB rate for new tariff options introduced after January 1, 1999, as PURA §39.202(a) specifically requires that the price to beat be based on bundled rates in effect on that date.

The commission agrees with ARM that it is inappropriate to allow affiliated REPs to offer "green" or "renewable" service offerings in their service territory, or to market price to beat service as a "green" or "renewable" product, unless such rates were in effect on January 1, 1999.

The commission does recognize that it may not be appropriate to develop a price to beat for certain rates, such as discounted rates or marginal cost based rates. As such, an electric utility, on behalf of its future affiliated REP should file tariffs for its price to beat rates within 60 days after the effective date of this rule. At the time of this filing, the utility may request that a price to beat not be developed for certain rates in effect on January 1, 1999.

Subsections (d)(2), (f)(1)(A), (f)(1)(B), and (f)(1)(C) of the rule have been modified accordingly.

TNMP stated that rather than applying the 6.0% rate reduction to each component of the rates, the rule should allow the price to beat to be calculated based on an average 6.0% decrease across the class. TNMP argued that this proposal complies with PURA and offers protection against the negative impacts that result from the skewed headroom between high usage and low usage customers. Consumer Commenters opposed the averaging of the 6.0% PTB decrease.

The commission concurs with Consumer Commenters. If the 6.0% decrease were averaged across all customers, there would be winners and losers. The commission concludes that it is appropriate to reduce base rates for each retail customer by 6.0% and as such, declines to change the rule as suggested by TNMP.

§25.41(f)(2) and (3)

Entergy REP recommended that the 60-day period be changed to 30 days because a 60-day average is too long to reflect current movements in the market and proposed changes to subsection (g)(1)(A) and (B) to shorten the time requirement from 60 days to 30-calendar days, and to use forward looking natural gas settlement prices for each season.

The Coalition agreed with AEP that the 60-day period is too long and would prevent any REP from being able to adequately hedge its purchases.

The commission concludes that it is appropriate to alter the period over which the average 12 month forward NMYEX gas price is averaged from a 60-day average to a ten-day average. Upon review of historical gas price data, the commission believes that the use of a 60-day average may result in too much of a lag from actual market prices. Use of a ten-day average should appropriately capture true trends in gas prices, while allowing adjustments to the fuel factor to better reflect changing market conditions and assist REPs in hedging their purchases.

Entergy REP proposed changes to subsection (f)(3)(D)(iii) as it determined that there should be no mandatory reduction of the fuel factor in effect on January 1, 1999, for Entergy REP. Entergy REP also proposed a new subsection (f)(3)(D)(iv) that states that "the fuel factors for affiliate electric utilities whose base rates were reduced by more than 12% as the result of a final order issued by the commission after October 1, 1998, to be used at the beginning of the price to beat period shall be the fuel factor in effect on January 1, 1999, plus the difference between the fuel factors established pursuant to subparagraphs (A), (B) and (C) of this paragraph and the fuel factor in effect on January 1, 1999."

The commission agrees with Entergy REP and adds new subsection (f)(3)(D)(iv) to clarify that the fuel factors to be used at the beginning of the price to beat period for a utility whose base rates were reduced by more than 12% shall be the updated fuel factor established pursuant to subsection (f)(3)(D). The commission has also changed the incorrect reference in (f)(3)(D)(iii) from subparagraph (A), (B), and (C) to subparagraph (D).

Entergy REP also proposed a new subsection (f)(3)(E) that would state that the seasonal fuel factors established pursuant to subsection (f)(3) shall be known as the baseline fuel factors. In addition, Entergy REP raised several policy issues that it believed needed to be addressed and suggested that one or more technical conferences be conducted to address these issues and to gain consensus on these policy questions. Entergy REP's list of policy questions/issues is as follows:

1. What generation resources should be used to estimate the fuel factor?

2. Is there a "cut-off" date prior to the rate year to determine which utility owned generation resources are to be used in determining the fuel factor, what is that cut off date?

3. Should the date be unique for each utility?

4. What issues of fairness among the affiliate REPs are implicated if the date is different for each utility?

5. What estimate of sales should be used in the development of a fuel factor?

6. If the fuel factor is determined based on the estimate of total system sales, how is the load shape for non-price to beat sales adjusted out of the price to beat fuel factors?

7. In the case of those utilities that participate in a FERC-approved system agreement to allocate generation capacity and energy costs, are these resources to be included in determining eligible fuel expenses? If so, how?

8. If FERC approves withdrawal of a utility from participation in a FERC-approved system agreement effective prior to the rate year, how should the fuel factors be computed?

9. Are eligible non-generation related revenues/expenses to be considered? If so, how?

10. Must a utility seek a good cause exception for treatment of eligible non-generation related revenues/expenses different than the treatment of these revenues/expenses in current fuel factors?

11. How does FERC's order No. 2000 affect treatment of these revenues/expenses in the computation of fuel factors?

TXU REP also noted that for Southwestern Electric Service Company (SESCO), as a non- generating investor-owned utility, it had no fuel factor in January 1999. As such, TXU REP proposed that SESCO's purchased cost recovery factor (PCRF) in effect on January 1, 1999 should be used to calculate SESCO's initial price to beat fuel factor.

The commission finds, that as stated in subsection (f)(3)(B), the proper reading of PURA §39.202(b) is that the final fuel factor should be set in the traditional manner as outlined by the current fuel rule. While the commission recognizes that the inclusion of a fuel factor based on historical integrated utility fuel costs as part of the price to beat appears inconsistent with the market structure under SB 7, where REPs are prohibited from owning generation, the commission finds that the price to beat was intended to be calculated from the each utility's regulated rate in effect on January 1, 1999, discounted by 6.0% and updated for a final fuel factor. Utility-specific issues are to be addressed in the individual fuel factor cases, within the confines of this finding.

The commission agrees with TXU REP that the proper treatment of the fuel cost factor for SESCO, as a non-generating utility with no fuel factor, is that the PCRF in effect on January 1, 1999 should be used for the price to beat fuel factor. To the extent that SESCO's current purchased power contract expires during the price to beat period, TXU REP should at that time request an adjustment to SESCO's price to beat in order to account for the new contract.

The commission also clarifies that any previous commission orders that address how a utility's price to beat fuel factor is to be set should be given effect in the utility's fuel factor case.

§25.41(g)

Entergy REP recommended that subsection (g)(1) be modified so that an affiliate REP may request up to four changes in the seasonal fuel factors in a calendar year. Entergy REP stated that this approach comports with PURA §39.202(l) because §39.202(l) contemplates a single fuel factor and since the commission has established two seasonal fuel factors, then it is reasonable to allow two separate adjustments to each seasonal fuel factor.

The commission disagrees that that the statutory allowance of two changes per year can be read to allow more than two changes per year. No change has been made. See comments on preamble Question 1 for the commission's discussion of seasonality.

Cities proposed a change to subsection (g)(1)(A) to strike January 1, 2002, and replace it with September 15, 2001.

The commission has made revisions to subsection (g)(1)(A) to clarify how the methodology for calculating an adjustment to the fuel factor should work. While the commission declines to adopt Cities' proposed change, the commission believes that the changes made in this subsection should address the concerns raised by Cities.

AEP commented that the procedural schedule referenced in subsection (g)(1)(D) should be revised to shorten the length of time it takes to obtain a final order on fuel factor revision applications. AEP supported TNMP's proposal that the procedural schedule be revised to require the issuance of an order within 20 days after a petition is filed if no hearing is requested and 45 days after a petition is filed if a hearing is requested within 15 days of the petition.

TNMP suggested changes to subsection (g)(1)(D) as well. TNMP proposed that in addition to the adjustment specified in the proposed rule, additional language be added that would allow the REP to recover the disparity during the period before the adjustment is implemented. TNMP contends this adjustment is necessary because the regulatory framework provides neither a mechanism for recovering the loss if the affiliated REP's costs rise, nor a policy basis for requiring affiliated REPs to absorb this loss. TNMP also requested adjustments to the proposed procedural process for adjustments to the fuel factor. TNMP stated that these adjustments are necessary because the current fuel rule would subject affiliated REPs to a 90-day delay and could cause additional losses of millions of dollars. TNMP requested that the procedural schedule be modified to require that an order be issued within 20 days after the petition is filed, if no hearing is requested within 15 days of the petition and within 45 days after the petition is filed if a hearing is requested within 15 days of the petition. If a hearing is requested, TNMP recommended, the hearing should be held no earlier than the first business day after the 25th day after the application is filed.

The commission finds that, for the purposes of an adjustment to the fuel factor resulting from a change in the NYMEX gas price index, TNMP's proposed procedural schedule is appropriate. For adjustments to the fuel factor under subsection (g)(1)(E) based on changes in headroom resulting from significant changes in the price of purchased energy, the commission will issue a final order within 60 days after an application is filed under this subsection. The commission disagrees with TNMP that an affiliated REP is entitled to recover any loss incurred during the process of evaluating a requested change as PURA does not contemplate any reconciliation of the price to beat and market prices, except during the 2004 true-up.

Adjustments to the price to beat based on financial integrity have the potential to be lengthy, contested cases. The commission therefore declines at this time to establish in the rule any procedural deadlines for such proceedings. The procedural schedule for a change in the price to beat due to financial integrity is more appropriately addressed on a case-by-case basis.

TXU REP proposed to eliminate subsection (g)(1)(E) that restricts the dates when the fuel adjustment can be filed. TNMP suggested that the 45-day requirement of subsection (g)(1)(E) be eliminated or that this requirement be changed to 120 days to allow the affiliated REP to delay an available adjustment to preserve for itself the option of seeking an adjustment at a subsequent time of the year.

The commission has revised subsection (g)(1)(E) of the rule in a manner that should address TXU REP's and TNMP's concerns.

§25.41(h)

TXU REP suggested revising subsections (h)(1) and (h)(2) to include language that an affiliated REP may not offer rates other than the price to beat rates to residential and small commercial customers in its "service area," at least not until the commission determines that "40% or more of the electric power consumed by residential customers within the affiliated electric utility's certificated service area before the onset of customer choice is committed to be served by nonaffiliated retail electric providers."

Entergy REP stated that an interpretation of §25.41(h)(1) would encompass all affiliated REPs in all service territories so that an affiliated REP would have to offer the price to beat wherever it had customers and proposed adding the following language to the above section and also subsection (h)(2): "...in its affiliated transmission and distribution utility's certificated service territory...." TNMP in its reply comments supported Entergy REP's clarification in the above subsection. In addition, Entergy REP agreed with TXU REP's proposal for §25.41(h).

The commission agrees with TXU REP and Entergy REP and has revised this subsection of the rule accordingly.

Entergy REP in its reply comments proposed adding the following language at the end of subsection (h)(1): "except as provided by the rate reduction program of the commission rules relating to the System Benefit Fund."

The commission agrees with Entergy REP and has made the corresponding change in subsection (h)(1).

ARM commented that the exception under subsection (h)(3) be strictly construed and reviewed by the commission to preclude misuse by the affiliated REPs; also, the commission should require a filing by the affiliated REPs to show that the customers are above 1000 kW, are commonly owned, or are of the same franchisor and could approve such filing within 30 days if there are no objections. ARM proposed that the subsection be revised accordingly. Entergy REP in its reply suggested rejecting ARM's proposal regarding aggregation exception because it is not authorized under PURA §39.202(f). Reliant in its reply disagreed with ARM regarding the need to file proof that aggregated small commercial loads charged non-PTB rates are eligible for such rates because it would place unnecessary burden on the affiliated REPs. TXU REP in its reply opposed ARM's proposal to prove eligibility of the aggregated load to receive rates other than the price to beat because it exceeds the authority allowed under PURA and the commission already has authority to investigate any complaints about improper activity.

The commission agrees with ARM and will require the affiliated REP to make an informational filing for customers who qualify for this exemption. The commission has amended subsection (l)(3) to reflect this requirement.

§25.41(i)

TXU REP commented that the proposed methodology cannot be implemented and that both the threshold target concept and specific language would have to be altered to be workable. The company stated that the idea of establishing a consumption baseline is a reasonable one and that it should be used as a means against which to calculate the 40% loss of load, and not as a target threshold, which cannot be established by June 1, 2001. TXU REP also stated that both residential and small commercial consumption should be addressed in the same manner; and that the following subsections should be renamed: (i) - "Calculation of baseline consumption for calendar year 2000," (i)(1) - "Calculation of baseline consumption," (A) and (B) - "Residential baseline" and "Small commercial baseline." Additionally, language about the 40% target should be deleted from these two subparagraphs, and added to subsections (h)(1) and (h)(2); and the "Small commercial baseline" section should be revised to require establishment of a small commercial customer baseline served in 2000, with no subtractions for ineligible customers, and the actual 40% target should be calculated after competition begins. TXU REP also noted a problem in subsection (i)(1)(B), in which 40% of the aggregated load from 2000 consumption of small commercial class is deducted and not 100% as required by PURA; however, no changes are needed as other proposed changes would correct this one. If not, TXU REP and Reliant proposed to delete "times 40%" in subsection (i)(1)(B).

TXU REP commented that dividing total consumption by one-twelfth of the number of bills does not produce an accurate calculation of the number of customers because each customer may receive more than one bill. A more accurate method to determine the average number of customers would be to count customers once each month for twelve months and then calculate the average over twelve months. TXU REP suggested modifying subsection (i)(2)(A)(ii) to reflect the above comments. Reliant in its reply agreed with TXU REP that the consumption threshold target cannot be calculated with certainty on June 1, 2001, and supported the proposal to establish a consumption baseline and changes to subsection (h).

In its reply, Entergy REP agreed with TXU REP regarding computation of average consumption and opposed using the number of bills in the computation. Entergy REP also opposed Consumer Commenters' method of counting switches, partly because some customers may be dropped to the POLR simply because their REP decides to leave the state; therefore all switches should be counted toward the threshold target.

The commission agrees with TXU REP and Entergy REP that it is more appropriate to use number of customers in the calculation of average usage as opposed to one-twelfth of the number of bills due to re-billings, etc. The commission also agrees with TXU REP and Reliant that there is a double application of the 40% in subsection (i)(1)(B) and corrects that subparagraph. The commission also recognizes TXU REP's concern regarding the establishment of target thresholds by June 1, 2001 given the uncertainty about what commonly-owned franchisee aggregated load may qualify and pursue an exemption under the rule. As such, the commission moves the initial filing date from June 2001 to December 2001 and requires updates to the small commercial threshold, as load is deemed eligible for the exemption.

TXU REP, SPS, TNMP in its reply, and Reliant opposed the exclusion of customers served by POLR from the target calculation and stated that the concern that an affiliated REP may terminate customers just to meet the 40% loss is unsubstantiated because the customer protection rules have detailed procedures on how terminations are to be done. Additionally, TXU REP stated that if the POLR customers are not to be counted because of an assumption that those customers have not exercised their market choice, this may not be accurate because some customers could voluntarily choose POLR or be dropped to POLR after having switched to a non-affiliated REP. TXU REP also argued that even if the affiliated REP drops a customer to the POLR, this is based on the same concept of choice embodied in SB 7, because this customer "chose" not to pay their bill. Also, TXU REP and Entergy REP stated that the law did not provide for this exclusion because it specified 40% or more served by "non-affiliated" REPs; however, if the POLR is the affiliated REP, then the customers should still count because the affiliated REP is not a POLR by choice.

Consumer Commenters stated that POLR customers should not count toward calculating the threshold. Consumer Commenters further noted that the commission should ensure that those customers who switch to the non-affiliated REP and then switch back to the affiliated REP are not counted since the threshold number should represent a point in time and not a cumulative number of switches.

In its reply, ARM stated that in spite of opposition by Reliant and other utilities, §25.41(i) should be adopted because gaming could still go on, only those customers who choose a provider should be counted, and the POLR is not a competitive provider. ARM opposes Reliant's proposal to establish a process for approving the affiliated REPs' target threshold filings; instead current procedural rules should apply. If a different timeline is adopted, then there should be sufficient time for a contested hearing. ARM also disagrees with the Reliant's suggestion to require a minimum term for small commercial customers on the PTB.

In their replies, Shell and OPC argued that the utilities' arguments for the 40% target calculation to include POLR customers should be rejected because those customers did not exercise choice regarding their provider.

The commission rejects utilities' arguments regarding counting customers dropped to the POLR and will not count them as "switches." The rationale for creating the POLR was to have an electric provider for those customers who may have difficulty exercising choice in the competitive market. Therefore, dropping customers to the POLR should not be considered a sign of a well functioning competitive market. Additionally, the commission agrees with Consumer Commenters that the threshold number is a snapshot in time and not a cumulative number of switches. No change in the language has been made. The commission finds that the current procedural rules should apply to the process of approving affiliated REPs' target threshold filings.

OPC proposed to revise §25.41(i)(2)(A) to say: "The amount of electric power consumed by residential customers *served* by non-affiliated REPs shall equal...."

The commission agrees and has made the requested change.

Reliant recommended that the commission require filings pursuant to §25.41(i)(2) be made jointly by the transmission and distribution utility (TDU) and the affiliated REP.

The commission finds that PURA explicitly requires the TDU to make filings to show that its affiliated REP has met the threshold. The TDU will have meter data for all customers, and will also know who the customers' REPs are. The commission therefore declines to adopt Reliant's suggestion.

Entergy REP asked for a clarification regarding §25.41(i)(1)(B) because PURA implies that the variable component in this subsection (i.e., the aggregated load served by the affiliated REP that complies with the requirements of (h)(3)) is to be counted prior to competition, thus removing it from the equation. Entergy REP also proposed deleting "times 40%" from subsection (i)(1)(B). ARM commented that the affiliated REP should be required to file information about customers and load that is deemed to qualify for the aggregated load exemption, as such an exemption is susceptible to gaming by the affiliated REP.

As stated above, the commission agrees with the concerns about the calculation of the small commercial threshold and has (1) moved the filing of the initial calculation to the end of 2001; and (2) required updates to the small commercial threshold calculation as load qualifies for the exemption and is served by the affiliated REP at a rate other than the price to beat rates. The commission also agrees with ARM that the affiliated REP should make an informational filing with the commission specifying the customer's name, premise identifications, size of customer's load, and how the customers qualify for the exemption. The affiliated REP may file such information under confidential seal, however, all certified REPs will be deemed to have standing to examine these filings. This section of the rule has been modified accordingly.

Entergy REP suggested changes to specify that a REP can not offer incentives to its customers to switch and can not promote competitors' interests or exchange customers with other REPs. Consumer Commenters went further to suggest that there be a prohibition against an affiliated REP offering any incentive or encouragement to competitors to get customers to switch to a nonaffiliated REP, in order to reach the 40% threshold sooner.

Consumer Commenters supported disclosure of the PTB. TXU REP, however, objected to the disclosure and offered the following two alternatives: (1) delete any language about disclosing the PTB when offering a higher price service; (2) only state the existence of a PTB when offering a higher priced service. TXU REP's based its objection on the requirement being "burdensome," because it would require printing multiple versions of customer education materials in order to include the specific price to beat rates for which particular customers would be eligible. Also, TXU REP felt it would be unnecessary because it might be as much as 36 months before some affiliated REPs could charge any rates other than the price to beat.

The commission disagrees with TXU REP's assumption that these disclosure requirements are burdensome. The REP will be required to provide an electricity facts label and other documents for every rate it offers; therefore, the commission determines that it will not be burdensome for the affiliated REP to add an additional column indicating the price to beat and a statement informing the customer that they are eligible for another rate. The commission also disagrees with TXU REP's proposal to state only the existence of the price to beat because not all customers are aware of the price to beat for one reason or another. For example, a customer moving from out of state would be unaware of the price to beat and may believe they have no choice. Therefore, the commission concludes that the language shall remain unchanged.

Reliant recommended that filings under subsections (i) and (l)(2) regarding power consumption threshold targets be made jointly by the transmission and distribution utility and the affiliated REP. In addition, Reliant recommended that a process for approving such filings under subsection (l) be established; specifically, that commission staff's review, recommendation and final approval be achieved within 60 days of the filing.

The commission finds that the statute specifies that the distribution utility make the filings; there is no need for the REP to be involved.

TXU REP objected to subsection (l)(2), which requires a warning filing when a 35% load loss has occurred. It believes that this requirement is burdensome, unnecessary and not authorized by SB 7. TXU REP suggested that the commission utilize reports produced by ERCOT to track the level of switching. Reliant agrees that this warning requirement is not necessary.

The commission disagrees with TXU REP and Reliant and notes that the commission only has 30 days to accept or reject this filing. The 35% filing is merely a informational report that an affiliated REP is approaching the 40% target.

Entergy REP stated that because ERCOT would not have load/use data on non-ERCOT customers, verification under subsection (l)(4)(C) would be difficult and costly.

The commission notes that the ERCOT ISO will be acting as the registration agent for all utilities in the state of Texas, and as such, should be able to provide information as to how many and which customers have switched to an alternate provider. Subsection (l)(4)(C) details certain other requirements for small commercial customers in excess of 20 kW that will be needed to verify an affiliated REP's claim that they have reached the 40% load loss threshold. No report from ERCOT is required under the section. The commission declines to modify the rule.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001), 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 §39.202 which establishes the price to beat obligation for affiliated retail electric providers.

Cross Reference to Statutes: PURA §§14.002, 39.152, 39.202, 39.262, and 39.406.

§25.41. Price to Beat.

(a) Applicability. This section applies to all affiliated retail electric providers (REPs) and transmission and distribution utilities, except river authorities. This section does not apply to an electric utility subject to Public Utility Regulatory Act (PURA) §39.102(c) until the end of the utility's rate freeze.

(b) Purpose. The purpose of this section is to promote the competitiveness of the retail electric market through the establishment of the price to beat that affiliated REPs must offer to retail customers beginning on January 1, 2002 pursuant to PURA §39.202.

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

(1) Affiliated electric utility--The electric utility from which an affiliated REP was unbundled in accordance with PURA §39.051.

(2) Competitive retailer--A REP or a municipally owned utility or distribution cooperative that offers customer choice in the restructured competitive electric power market or any other entity authorized to sell electric power and energy at retail in Texas.

(3) Headroom--The difference between the average price to beat (in cents per kilowatt hour (kWh)) and the sum of the average non-bypassable charges or credits approved by the commission in a proceeding pursuant to PURA §39.201, or PURA Subchapter G (in cents per kWh) and the representative power price (in cents per kWh). Headroom may be a positive or negative number. A separate headroom number shall be calculated for the typical residential customer and the typical small commercial customer. The calculation for the typical residential customer shall assume 1,000 kWh per month in usage. The calculation of the typical small commercial customer shall assumer 35 kilowatts (kW) of demand and 15,000 kWh per month in usage.

(4) Nonaffiliated REP--Any competitive retailer conducting business in a transmission and distribution utility's (TDU's) certificated service territory that is not affiliated with that TDU.

(5) Peak demand--The highest 15-minute or 30-minute demand recorded during a 12- month period.

(6) Price to beat period--The price to beat period shall be from January 1, 2002 to January 1, 2007. In a power region outside the Electric Reliability Council of Texas (ERCOT) if customer choice is introduced before the date the commission certifies the power region pursuant to PURA §39.152(a) are met, the price to beat period continues, unless changed by the commission in accordance with PURA Chapter 39, until the later of 60 months after the date customer choice is introduced in the power region or the date the commission certifies the power region as a qualified power region.

(7) Provider of last resort (POLR)--As defined in §25.43 of this title (relating to Provider of Last Resort).

(8) Registration agent--As defined in §25.454 of this title (relating to Rate Reduction Programs).

(9) Representative power price--The simple average of the results of:

(A) a request for proposals (RFP) for full-requirements service of 10% of price to beat load for a duration of three years expressed in cents per kWh; and

(B) the price resulting from the capacity auctions required by PURA §25.381 of this title (relating to Capacity Auctions) for baseload capacity entitlements expressed in cents per kWh. The calculation of the price resulting from the capacity auctions shall assume dispatch of 100% of the entitlement and shall use the most recent auction of a 12-month forward strip of entitlements, or the most recent aggregated forward 12 months of entitlements.

(10) Residential customer--Retail customers classified as residential by the applicable transmission and distribution utility tariff or, in the absence of classification under a residential rate class, those retail customers that are primarily end users consuming electricity for personal, family or household purposes and who are not resellers of electricity.

(11) Small commercial customer--A non-residential retail customer having a peak demand of 1,000 kilowatts (kW) or less. For purposes of this section, the term small commercial customer refers to

a metered point of delivery. Additionally, any non-metered point of delivery with peak demand of less than 1,000 kW shall also be considered a small commercial customer.

(12) Transmission and distribution utility--As defined in §25.5 of this title (relating to Definitions), except for purposes of this section, this term does not include a river authority.

(d) Price to beat offer.

(1) Beginning with the first billing cycle of the price to beat period and continuing through the last billing cycle of the price to beat period, an affiliated REP shall make available to residential and small commercial customers of its affiliated transmission and distribution utility rates that, subject to the exception listed in subsection (f)(2)(A) of this section, on a bundled basis, are 6.0% less than the affiliated electric utility's corresponding average residential and small commercial rates that were in effect on January 1, 1999, adjusted to reflect the fuel factor determined in accordance with subsection (f)(3)(D) of this section and adjusted for any base rate reduction as stipulated to by an electric utility in a proceeding for which a final order had not been issued by January 1, 1999.

(2) Unless specifically required by commission rule, an affiliated REP may only sell electricity to price to beat customers labeled or marketed as "green," "renewable," "interruptible," "experimental," "time of use," "curtailable," or "real time," if and only if such a tariff option existed on January 1, 1999 and only for service under the price to beat rate that was developed from that tariff.

(e) Eligibility for the price to beat. The following criteria shall be used in determining eligibility for the price to beat:

(1) Residential customers. All current and future residential customers, as defined by this section, shall be eligible for the price to beat rate(s) for which they meet the eligibility criteria in the applicable price to beat tariffs for the duration of the price to beat period. An affiliated REP may not refuse service under the price to beat to a residential customer except as provided by §25.477 of this title (relating to Refusal of Service). An affiliated REP may not require residential customers to enter into service agreements with a term of service as a condition of obtaining service under the price to beat, nor may an affiliated REP provide any inducements to encourage customers to agree to a term of service in conjunction with service under the price to beat.

(2) Small commercial customers.

(A) A non-residential customer taking service from the affiliated electric utility on December 31, 2001, shall be considered a small commercial customer under this section and shall be eligible for service under price to beat tariffs if that customer's peak demand during the 12 consecutive months ending on September 30, 2001, does not exceed 1,000 kilowatts (kW). A non-residential customer with a peak demand in excess of 1,000 kW during the 12 months ending September 30, 2001, or during the price to beat period, shall no longer be considered a small commercial customer under this section. However, any non-residential customer whose peak demand does not exceed 1,000 kW for any period of 12 consecutive months after it became ineligible to be a small commercial customer under this section shall be considered a small commercial customer for billing periods going forward for purposes of this section.

(B) All small commercial customers, as defined by this section, shall be eligible for the price to beat rate(s) for which they meet the eligibility criteria in the applicable price to beat tariffs for the duration of the price to beat period. An affiliated REP may not refuse service under the price to beat to a small commercial customer, except as provided by §25.477 of this title. An affiliated REP may not require small commercial customers to enter into service agreements with a term of service as a condition to obtaining service under the price to beat, nor may an affiliated REP provide any inducements to encourage customers to agree to a term of service in conjunction with service under the price to beat.

(f) Calculation of the price to beat.

(1) Rates to be used for price to beat calculation. The following criteria shall be used in determining the rates to be used for the price to beat calculation.

(A) Residential. A price to beat rate shall be calculated for each rate and service rider under which a residential customer was taking service on January 1, 1999, except as approved by the commission pursuant to subparagraph (C) of this paragraph. A price to beat rate shall not be calculated for any new service or tariff option granted to an affiliated electric utility pursuant to PURA §39.054, or any other rate or tariff option not in effect on January 1, 1999.

(i) Beginning with the first full billing cycle of the price to beat period, residential customers served by the affiliated REP shall be placed on the price to beat rate derived from the rate under which they were taking service on December 31, 2001.

(ii) Beginning with the first full billing cycle of the price to beat period, residential customers served by the affiliated REP who were taking service under a rate for which a price to beat rate was not developed, shall be placed on the price to beat rate derived from any eligible residential rate that was or would have been available to the customer on January 1, 1999.

(iii) New residential customers after December 31, 2001, may choose any price to beat rate for which they meet the eligibility requirements as detailed in the applicable price to beat tariff.

(iv) Residential customers who return to the affiliated REP after being served by a non-affiliated REP may choose any price to beat for which they meet the eligibility requirements as detailed in the applicable price to beat tariff(s).

(v) Notwithstanding clauses (i) - (iv) of this subparagraph, residential customers may request service under any price to beat rate for which they are eligible. Selection of the most advantageous rate shall be the sole responsibility of the residential customer.

(B) Small commercial. A price to beat rate shall be calculated for each rate and service rider under which a small commercial customer was taking service on January 1, 1999, except as approved by the commission pursuant to subparagraph (C) of this paragraph. A price to beat rate shall not be calculated for any new service or tariff option granted to an affiliated electric utility pursuant to PURA §39.054, or for any rate of tariff option not in effect on January 1, 1999.

(i) Beginning with the first full billing cycle of the price to beat period, small commercial customers served by the affiliated REP shall be placed on the price to beat rate derived from the rate under which they were taking service on December 31, 2001.

(ii) Beginning with the first full billing cycle of the price to beat period, small commercial customers served by the affiliated REP beginning in January of 2002, who were taking service under a rate for which a price to beat rate was not developed, shall be placed on a price to beat rate derived from an eligible rate that was or would have been available to the customer on January 1, 1999.

(iii) New small commercial customers after December 31, 2001, may choose any price to beat rate for which they meet the eligibility requirements as detailed in the applicable price to beat tariff.

(iv) Small commercial customers who return to the affiliated REP after being served by a non-affiliated REP may choose

any price to beat rate for which they meet the eligibility requirements as detailed in the price to beat tariff(s).

(v) Notwithstanding clauses (i) - (iv) of this subparagraph, small commercial customers may request service under any price to beat tariff for which they are eligible. Selection of the most advantageous rate shall be the sole responsibility of the small commercial customer.

(C) An electric utility, on behalf of its future affiliated REP, shall file within 60 days of the effective date of this section, price to beat tariffs and supporting workpapers for the price to beat rates developed in accordance with subparagraphs (A) and (B) of this paragraph. At the time of this filing, the affiliated REP may request that a price to beat rate not be developed from a particular rate of service rider along with justification for the request. The electric utility shall provide notice to all customers currently taking service under such rates or service riders of the utility's request.

(2) Base rate component of price to beat. For the eligible rates identified in paragraph (1) of this subsection, the affiliated REP shall reduce each base rate component including any purchased power cost recovery factor (PCRF), in effect for the affiliated electric utility on January 1, 1999, by 6.0% in order to determine the base rate component of the price to beat, with the following exceptions:

(A) If base rates for the affiliated electric utility were reduced by more than 12% as the result of a final order issued by the commission after October 1, 1998, then the price to beat shall be the rate in effect as a result of a settlement approved by the commission after January 1, 1999.

(B) For affiliated REPs operating in a region defined by PURA §39.401, the commission may reduce rates by less than 6.0% if the commission determines a lesser reduction is necessary and consistent with the capital requirements needed to develop the infrastructure necessary to facilitate competition among electric generators.

(C) Except as provided in subparagraphs (A) and (B) of this paragraph, for any affiliated electric utility that has stipulated to rate reductions in a proceeding for which a final order had not been issued by January 1, 1999, such rate reductions shall be deducted from the base rates in effect on January 1, 1999, in addition to the 6.0% reduction. Such rate credits shall also be applied to the rates of the transmission and distribution utility.

(3) Fuel factor component of price to beat.

(A) Each affiliated electric utility shall file an application to establish one or more fuel factors, to be effective on January 1, 2002, according to the following schedule:

(i) April 1, 2001 - Reliant Houston Lighting & Power;

(ii) May 1, 2001 - TXU Electric Company;

(iii) June 1, 2001 - Texas-New Mexico Power Company and Central Power & Light Company;

(iv) July 1, 2001 - Entergy Gulf States, Inc. and West Texas Utilities;

(v) August 1, 2001 - Southwestern Electric Power Company and Southwestern Public Service Company.

(B) The rate year for the filing shall be calendar year 2002. The affiliated electric utility shall follow the requirements of §25.237(a)(1), (b), (c) and (e) of this title (relating to Fuel Factors) and the Fuel Factor Filing Package of November 23, 1993, for the filing of its fuel factor(s). To the extent that the commission has issued an order for a utility that includes provisions relating to the price to beat fuel factor, the price to beat fuel factor shall be set consistent with such an order.

(C) Subject to the limitations in clause (i) and (ii) of this subparagraph, affiliated electric utilities may utilize seasonal fuel factors to reflect the expected differences in the cost of the market price of electricity throughout the year.

(i) Affiliated electric utilities with seasonal fuel factors in effect on or before March 1, 2001, may request seasonal fuel factors for their residential and small commercial price to beat customers provided the level of seasonality is identical to that reflected in its commission-approved fuel factors on March 1, 2001.

(ii) Affiliated electric utilities without seasonal fuel factors in effect on or before March 1, 2001, may request seasonal fuel factors to be applicable to small commercial price to beat customers only. Any request for seasonal fuel factors under this clause must demonstrate that the average small commercial customer will receive, on an annual basis, a 6.0% reduction from the average bundled rate in effect on January 1, 1999, adjusted for the final fuel factor determined under subparagraph (D) of this paragraph; provided, however, that a utility subject to the exception in paragraph (2)(A) of this subsection must demonstrate that the average small commercial customer will receive, on an annual basis, the average bundled rate in effect as the result of a settlement approved by the commission after January 1, 1999, adjusted for the final fuel factor determined under subparagraph (D) of this paragraph.

(D) Each affiliated electric utility shall file additional information on October 1, 2001, to reflect changes in the price of natural gas for the rate year of 2002. The affiliated electric utility shall also file information necessary to determine the initial headroom that exists under the price to beat as a result of the setting of the initial price to beat fuel factor pursuant to this subparagraph. The adjustment shall be calculated using the following methodology:

(i) For the ten-day period ending on September 15, 2001, an average price shall be calculated for each month of 2002 in the closing forward NYMEX Henry Hub natural gas prices, as reported in the Wall Street Journal.

(ii) All other inputs into the calculation of the fuel factors will be the same as those used to calculate the fuel factor in subparagraphs (B) and (C) of this paragraph.

(iii) Except for affiliated electric utilities whose base rates were reduced by more than 12% as the result of a final order issued by the commission after October 1, 1998, the fuel factor(s) to be used at the beginning of the price to beat period shall be the fuel factor in effect on January 1, 1999, reduced by 6.0%, plus the difference between the fuel factor(s) established pursuant to this subparagraph and the fuel factor in effect on January 1, 1999.

(iv) The fuel factor(s) for affiliate electric utilities whose base rates were reduced by more than 12% as the result of a final order issued by the commission after October 1, 1998, to be used at the beginning of the price to beat period shall be the fuel factor(s) established pursuant to this subparagraph.

(E) For a non-generating investor-owned utility with no fuel factor as of January 1, 1999, its PCRF in effect on January 1, 1999, shall be the equivalent to a fuel factor for purposes of calculating its price to beat rates and future fuel cost adjustments under subsection (g) of this section. Upon expiration of a purchased power contract of an affiliated REP unbundled from such a utility, the affiliated REP may request a change in its PCRF to account for any difference in purchased power costs.

(g) Adjustments to the price to beat.

(1) Fuel factor adjustments. An affiliated retail electric provider may request that the commission adjust the fuel factor(s) established under subsection (f)(3) of this section not more than twice in a calendar year if the affiliated retail electric provider demonstrates that the existing fuel factor(s) do not adequately reflect significant changes in the market price of natural gas and purchased energy used to serve retail customers. As part of a filing made pursuant to this paragraph, an affiliated REP may also request an adjustment to the seasonality imparted to the fuel factor in accordance with subsection (f)(3)(C) of this section. Alternatively, the commission may, as part of its approval of an adjustment to the fuel factor, impose a change in the seasonality imparted to the fuel factor. The methodology for calculating the adjustment to the fuel factor(s) shall be the following:

(A) For each business day of the ten-day period ending no more than ten business days before the filing of a fuel factor adjustment application, an average of the closing forward 12-month NYMEX Henry Hub natural gas prices, as reported in the *Wall Street Journal*, is calculated.

(B) The average forward price for each business day calculated in subparagraph (A) of this paragraph will then be averaged to determine a ten-day rolling price.

(C) The percentage difference between the averaged ten-day rolling price calculated under subparagraphs (A) and (B) of this paragraph and the averaged ten-day rolling price used to calculate the current fuel factor(s) is calculated. If the current fuel factor was calculated through an adjustment under subparagraph (E) of this paragraph, then the averaged ten-day rolling price calculated concurrent with that adjustment shall be used. If the percentage difference is 4.0% or more, the current fuel factor(s) may be adjusted.

(D) To adjust the current fuel factor(s), the percentage difference is added to one and then multiplied by the current factor(s). The results are the adjusted fuel factor(s) that will be implemented according to the procedural schedule in clause (i) and (ii) of this subparagraph:

(i) if no hearing is requested within 15 days after the petition has been filed, a final order shall be issued within 20 days after the petition is filed;

(ii) if a hearing is requested within 15 days after the petition is filed, a final order shall be issued within 45 days after the petition is filed.

(E) In addition to the adjustment permitted under subparagraphs (A)-(D) of this paragraph, an affiliated REP may also request an adjustment to the fuel factor if the headroom under the price to beat decreases as a result of significant changes in the price of purchased energy. In making a request under this subparagraph:

(i) an affiliated REP shall demonstrate that:

(I) the representative power price has changed such that the headroom under the price to beat has decreased; and

(II) the adjustment to the fuel factor is necessary to restore the amount of headroom that existed at the time that the initial price to beat fuel factor was set by the commission using then current forecasts of the representative power price.

(III) an affiliated REP making an adjustment under this subparagraph shall also file the gas price calculation in subparagraphs (A) and (B) of this paragraph for purposes subsequent adjustments to the fuel factor based on changes in natural gas prices.

(ii) the commission will issue a final order on an application filed under this subparagraph within 60 days after the application is filed.

(F) The commission shall, upon a showing made by an interested party, that a sufficiently liquid electricity commodity index has developed for the affiliated REP's relevant power region, allow an affiliated REP to transition to the use of an electricity commodity index to adjust the fuel factor for significant changes in the price of purchased energy. The commission shall only allow the use of the index after the power generation company affiliated with the affiliated REP has finalized their stranded cost determination. After the commission has made a finding that a sufficiently liquid electricity commodity index has developed, the affiliated REP shall be required to perform an additional adjustment under subparagraphs (A) through (D) or (E) of this paragraph before utilization of the index to change the fuel factor so that a benchmark index price can be established. Subsequent changes to the fuel factor shall be based on the percentage change in the electricity commodity index.

(2) Adjustment for financial integrity. Upon a finding that an affiliated REP will be unable to maintain its financial integrity if it complies with subsection (f) of this section, the commission shall set the affiliated REP's price to beat at the minimum level that will allow the affiliated REP to maintain its financial integrity. However, in no event shall the price to beat exceed the level of rates, on a bundled basis, charged by the affiliated electric utility on September 1, 1999, adjusted for fuel.

(3) True-up adjustment. The commission may adjust the price to beat following the true-up proceedings under PURA §39.262.

(h) Non-price to beat offers.

(1) Offers to residential customers. An affiliated REP may not offer any rates other than the price to beat rates to residential customers within the affiliated electric utility's service area until the earlier of 36 months after the date customer choice is introduced, or when the commission determines that an affiliated REP has met or exceeded the threshold target for residential customers described in subsection (i) of this section, except as provided by §25.454 of this title (relating to Rate Reduction Program).

(2) Offers to small commercial customers. An affiliated REP may not offer rates other than the price to beat rates to small commercial customers until the earlier of 36 months after the date customer choice is introduced, or when the commission determines that an affiliated REP has met or exceeded the threshold target for small commercial customers described in subsection (i) of this section.

(3) Offers to aggregated small commercial load. Notwithstanding paragraph (2) of this subsection, an affiliated REP may charge rates different from the price to beat for service to aggregated loads having an aggregated peak demand in excess of 1,000 kW provided that all affected customers are commonly owned or are franchisees of the same franchisor.

(A) If aggregated customers whose loads are served by an affiliated REP in accordance with this subsection disaggregate, those individual customers may resume service under the applicable price to beat rate(s), provided that those customers meet the eligibility requirements of subsection (e) of this section.

(B) Any usage removed from the threshold calculation in subsection (i)(1)(B) of this section due to aggregation shall be added back into the threshold calculation upon disaggregation of the aggregated load.

(i) Threshold targets.

(1) Calculation of threshold targets.

(A) Residential target. The residential threshold target shall be equal to 40% of the total number of kilowatt-hours (kWh) consumed by residential customers served by the affiliated electric utility during the calendar year 2000.

(B) Small commercial target. The small commercial threshold target shall be equal to 40% of the following difference: the total number of kWh consumed by small commercial customers served by the affiliated electric utility during the calendar year 2000 minus the aggregated load served by the affiliated REP that complies with the requirements of subsection (h)(3) of this section. The kWh associated with a customer who becomes ineligible for the price to beat because the customer's peak demand exceeds 1,000 kW shall also be removed from the threshold target.

(2) Meeting of threshold targets. Upon a showing by the affiliated transmission and distribution utility that the electric power consumption of the relevant customer group served by nonaffiliated REPs meets or exceeds the targets determined by the calculation in paragraph (1) of this subsection, the affiliated REP may offer rates other than the price to beat.

(A) Calculation of residential consumption. The amount of electric power of residential customers served by nonaffiliated REPs shall equal the number of residential customers served by nonaffiliated REPs, except customers that the affiliated REP has dropped to the POLR, times the average annual consumption of residential customers served by the affiliated utility during the calendar year 2000.

(i) The number of customers served by nonaffiliated REPs shall be determined by summing the number of customers in the transmission and distribution utility's certificated service area with a designated REP other than the affiliated REP in the registration database maintained by the registration agent. Customers dropped to the POLR by the affiliated REP shall not count as load served by a nonaffiliated REP.

(ii) The average annual consumption shall be calculated by dividing the total kWh consumed by residential customers during the calendar year 2000 by the average number of residential customers during the calendar year 2000. The average number of residential customers during the calendar year 2000 shall be calculated by dividing the sum of the total number of such customers for each month of the year 2000 by 12.

(B) Calculation of small commercial consumption. The amount of electric power consumed by small commercial customers served by nonaffiliated REPs shall be determined using the following criteria, except that customers served by the POLR shall not count as load served by a nonaffiliated REP:

(i) The amount of electric power of small commercial customers with peak demand less than 20 kW consumed by nonaffiliated REPs shall be equal to the number of small commercial customers with peak demand less than 20 kW served by nonaffiliated REPs times the average annual consumption of small commercial customers with peak demand less than 20 kW served by the affiliated electric utility during the calendar year 2000.

(I) The number of customers served by nonaffiliated REPs shall be determined by summing the number of small commercial customers with peak demands less than 20 kW served in the transmission and distribution utility's certificated service area with a designated REP other than the affiliated REP in the registration database maintained by the registration agent.

(II) The average annual consumption shall be calculated by dividing the total kWh consumed by small commercial customers with peak demand of less than 20 kW during the calendar year 2000 by the average number of small commercial customers with peak demand of less than 20 kW during the calendar year 2000. The average number of small commercial customers with peak demand of less than 20 kW shall be calculated by dividing the total number of such customers for each month of 2000 by 12.

(ii) The amount of electric power consumed by small commercial customers with peak demand in excess of 20 kW shall be the actual usage of those customers during the calendar year 2000.

(I) If less than 12 months of consumption history exists for such a customer during the calendar year 2000, the available calendar year 2000 usage history shall be supplemented with the most recent prior history of service at that customer's location for the unavailable months.

(II) For customers with service to a new location, the annual consumption shall be deemed to be equal to the estimated maximum annual demand used by the affiliated transmission and distribution utility in sizing the facilities installed to serve that customer multiplied by the product of 8,760 hours and the average annual load factor for small commercial customers with peak demand greater than 20 kW for the year 2000.

(j) Prohibition on incentives to switch. An affiliated REP may not provide an incentive to switch to a nonaffiliated REP, promote any nonaffiliated REP, or exchange customers with any nonaffiliated REP in order to meet the requirements of subsection (f) of this section. Nonaffiliated REPs may not provide an incentive to return to the price to beat.

(k) Disclosure of price to beat rate. An affiliated retail electric provider shall disclose to customers, the price to beat in accordance with §25.471 (relating to General Provisions of Customer Protection Rules). In addition, if an affiliated REP offers a rate greater than the price to beat, the price to beat rate must be disclosed along with a statement that the customer is eligible for the price to beat. This disclosure must appear on all written authorizations, Internet authorizations, the electricity facts label and Terms of Service document. It must also be disclosed during telephone solicitations before the customer authorizes service.

(l) Filing requirements.

(1) On determining that its affiliated retail electric provider has met the requirements of subsection (i) of this section, an electric utility or transmission and distribution utility shall make a filing with the commission attesting under oath to the fact that those requirements have been met and that the restrictions of subsection (h) of this section as well as the true-up in PURA §39.262(e) are no longer applicable.

(2) An electric utility or transmission and distribution utility shall file a progress report with the commission after its affiliated REP has met the requirements of subsection (i) of this section using a 35% threshold target in lieu of a 40% threshold. Such progress reports(s) shall be filed no later than 30 days after the 35% threshold has been met and shall contain the same information required in this subsection.

(3) No later than December 31, 2001, each transmission and distribution utility shall determine the power consumption threshold targets under subsection (i) of this section for residential and small commercial customers within its certificated service area and shall file this information with the commission and shall also make this information publicly available through its Internet website. Each transmission

and distribution utility, together with its affiliated REP, shall update the small commercial power consumption threshold as needed to reflect additional small commercial load that has met the requirements of subsection (h)(3) of this section and therefore is appropriate removed from the calculation of the threshold target. Concurrent with this update, the transmission and distribution utility, together with its affiliated REP, shall provide, for each group of aggregated customers that have been removed from the calculation of the threshold target, the customers' names, electric service identifiers, size of the customers' loads (individually and in the aggregate), and how the customers meet the requirements of subsection (h)(3). Such information may be filed under confidential seal. All certificated REPs shall be deemed to have standing to review such filings.

(4) Any application filed pursuant to this subsection shall contain the following information:

(A) a detailed explanation of how the relevant customer group has met or exceeded the threshold consumption targets in subsection (i) of this section;

(B) calculation of the power consumption threshold target under subsection (i) of this section for the relevant customer group and the date such target was met;

(C) verification of the meeting of the threshold target in the following manner:

(i) for the residential customer class, independent verification from the registration agent verifying the number of customers in the residential customer class within the transmission and distribution utility's certificated service area that are committed to be served by non-affiliated REPs.

(ii) for the small commercial class, an affidavit detailing the number of customers in the small commercial class with peak demand below 20 kW within the transmission and distribution utility's certificated service area committed to be served by non-affiliated REPs and the customers with peak demand in excess of 20 kW with their actual usage calculated in accordance with subsection (i)(2)(B)(ii) within the transmission and distribution utility's certificated service area that are committed to be served by non-affiliated REPs.

(iii) For purposes of this subsection, a residential and small commercial customer has committed to be served by a non-affiliated retail electric provider if the registration agent has received a switch request for that customer and any mandated cancellation period pursuant to applicable commission rule has expired.

(5) The commission staff shall review all applications filed under this subsection and shall make a recommendation to the commission within ten days after the application is filed to approve or reject the application. If a filing has insufficient information from which the commission can make a determination, the commission may reject the filing without prejudice for refiling the application. The commission shall issue an order approving or rejecting the application within 30 days after the application is filed. An electric utility or transmission and distribution utility filing an application under this subsection shall not charge rates different from the price to beat until the earlier of 36 months after the date customer choice is introduced or the date such application has been approved by the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 21, 2001.

TRD-200101624
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: April10, 2001
Proposal publication date: November 10, 2000
For further information, please call: (512) 936-7308

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 31. ADMINISTRATION

16 TAC §31.2

The Texas Alcoholic Beverage Commission adopts amendments to §31.2 without changes to the text as originally published in the February 16, 2001 edition of the *Texas Register,* (26 TexReg 1452).

The adopted amendments govern the assignment and use of non-police vehicles. The amendments conform to the requirements of Texas Government Code, §2171.1045 and were adopted by command of that statute. No comments were received regarding thee amendments.

These amendments are adopted under Texas Government Code, §2171.1045.

Cross reference: No provision of statutory law is affected by this rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 21, 2001.

TRD-200101609
Randy Yarbrough
Assistant Administrator
Texas Alcoholic Beverage Commission
Effective date: April 10, 2001
Proposal publication date: February 16, 2001
For further information, please call: (512) 206-3204

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TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 131. PRACTICE AND PROCEDURE

SUBCHAPTER G. BOARD REVIEW OF APPLICATION

22 TAC §131.114

The Texas Board of Professional Engineers adopts the repeal to §131.114, concerning board review and application, without changes to the proposed text as published in the January 26, 2001 issue of the *Texas Register* (26 TexReg 870).

The repeal of §131.114 enables the board to adopt new §131.114 due to extensive modification of this section.

No comments were received regarding adoption of the repeal.

The repeal is adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101758
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: April 15, 2001
Proposal publication date: January 26, 2001
For further information, please call: (512) 440-7723

♦ ♦ ♦

The Texas Board of Professional Engineers adopts new §131.114, concerning board review and application, without changes to the proposed text as published in the January 26, 2001 issue of the *Texas Register* (26 TexReg 870).

New §131.114 provides the authority for the Licensing Committee to conduct personal interviews with applicants and makes final recommendations to the full board at the quarterly board meetings.

No comments were received regarding adoption of the new section.

The new section is adopted under Texas Civil Statutes, Article 3271a, §8(a), which provide the Texas Board of Professional Engineers with the authority to promulgate rules in accordance with the Texas Engineering Practice Act, §20A.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101759
Victoria J.L. Hsu, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: April 15, 2001
Proposal publication date: January 26, 2001
For further information, please call: (512) 440-7723

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PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

CHAPTER 231. ADMINISTRATION
SUBCHAPTER A. DEFINITIONS

22 TAC §231.1

The Board of Vocational Nurse Examiners adopts the amendment of §231.1 relating to definitions without changes to the proposed text published in the February 16, 2001, issue of the *Texas Register* (26 TexReg 1472).

The definition of Endorsement is amended for consistency with compact rules.

No comments were received relative to the adoption of this rule.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the 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 March 21, 2001.

TRD-200101610
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: April 10, 2001
Proposal publication date: February 16, 2001
For further information, please call: (512) 305-7653

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CHAPTER 233. EDUCATION
SUBCHAPTER B. OPERATION OF A VOCATIONAL NURSING PROGRAM

22 TAC §233.22, §233.23

The Board of Vocational Nurse Examiners adopts the amendment of §233.22 relating to Instructors and 233.23 relating to Designate Supervisors without changes to the proposed text published in the February 16, 2001, issue of the *Texas Register* (26 TexReg 1474).

The rules are adopted for consistency with the compact rules.

No comments were received relative to the adoption of these rules.

The amendments are adopted under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law. or code will be affected by this proposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 21, 2001.

TRD-200101611
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: April 10, 2001
Proposal publication date: February 16, 2001
For further information, please call: (512) 305-7653

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CHAPTER 235. LICENSING
SUBCHAPTER A. APPLICATION FOR LICENSURE

22 TAC §235.6

The Board of Vocational Nurse Examiners adopts the repeal of §235.6 relating to Applications for Licensure by Endorsement without changes to the text published in the February 16, 2001, issue of the *Texas Register* (26 TexReg 1475).

The rule was repealed for consistency with compact rules.

No comments were received relative to the adoption of this repeal.

The repeal is adopted under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the 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 March 21, 2001.

TRD-200101612
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: April 10, 2001
Proposal publication date: February 16, 2001
For further information, please call: (512) 305-7653

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The Board of Vocational Nurse Examiners adopts new §235.6 relating to Applications for Licensure by Endorsement without changes to the proposed text published in the February 16, 2001, issue of the *Texas Register* (26 TexReg 1475).

The rule is adopted for consistency with compact rules.

No comments were received relative to the adoption of this rule.

The rule is adopted under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the 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 March 21, 2001.

TRD-200101613
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: April 10, 2001
Proposal publication date: February 16, 2001
For further information, please call: (512) 305-7653

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22 TAC §235.17

The Board of Vocational Nurse Examiners adopts the amendment of §235.17 relating to Temporary Permits without changes to the proposed text published in the February 16, 2001, issue of the *Texas Register* (26 TexReg 1475).

The rule is adopted for consistency with compact rules.

No comments were received relative to the adoption of this rule.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the 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 March 21, 2001.

TRD-200101614
Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: April 10, 2001
Proposal publication date: February 16, 2001
For further information, please call: (512) 305-7653

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CHAPTER 239. CONTESTED CASE PROCEDURE
SUBCHAPTER B. ENFORCEMENT

22 TAC §239.11

The Board of Vocational Nurse Examiners adopts the amendment of §239.11 relating to Unprofessional Conduct without changes to the text published in the February 16, 2001 issue of the Texas Register (26 TexReg 1476).

Subsection (9) of this rule is amended for consistency with compact rules.

No comments were received relative to the adoption of this rule.

The amendment is proposed under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the 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 March 21, 2001.

TRD-200101615

Mary M. Strange, RN, MSN
Executive Director
Board of Vocational Nurse Examiners
Effective date: April 10, 2001
Proposal publication date: February 16, 2001
For further information, please call: (512) 305-7653

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 505. THE BOARD

22 TAC §505.10

The Texas State Board of Public Accountancy adopts an amendment to Section 505.10 concerning Board Committees without changes to the proposed text as published in the February 9, 2001, issue of the *Texas Register* (26 TexReg 1230).

The amendment allows committee assignments to be two years and authorizes the presiding officer to re-appoint committee members.

The amendment will function by having committee appointments for a time certain and by having the presiding officer authorized to re-appoint committee members.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 1999) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and Section 901.55 which uses the term presiding officer.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101761
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: April 15, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 305-7848

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CHAPTER 511. CERTIFICATION AS A CPA
SUBCHAPTER B. CERTIFICATION BY EXAMINATION

22 TAC §511.27

The Texas State Board of Public Accountancy adopts new §511.27 concerning Good Moral Character Evidence from Foreign Residents without changes to the proposed text as published in the February 9, 2001 issue of the *Texas Register* (26 TexReg 1233).

The new rule allows residents of other countries to present evidence of their good moral character from their home country.

The new rule will function by allowing applicants from foreign countries a way to present evidence of their good moral character.

No comments were received regarding adoption of the rule.

The new rule is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 1999) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and Section 901.253 which authorizes the Board to ensure that an applicant is of good moral character.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101766
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: April 15, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 305-7848

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CHAPTER 527. QUALITY REVIEW

22 TAC §527.4

The Texas State Board of Public Accountancy adopts an amendment to Section 527.4 concerning Quality Review Program without changes to the proposed text as published in the January 26, 2001, issue of the *Texas Register* (26 TexReg 871).

The amendment allows the deletion of former subsections (4)(a) and (B) which imposed requirements on potential QROB members.

The amendment will function by having the pool of potential QROB members expanded.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act, Tex. Occupations Code, Section 901.151 (Vernon 1999) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and Section 901.159 which authorizes the Board to provide a quality review program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101765
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: April 15, 2001
Proposal publication date: January 26, 2001
For further information, please call: (512) 305-7848

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PART 35. TEXAS STATE BOARD OF EXAMINERS OF MARRIAGE AND FAMILY THERAPISTS

CHAPTER 801. LICENSURE AND REGULATION OF MARRIAGE AND FAMILY THERAPISTS

The Texas State Board of Examiners of Marriage and Family Therapists (board) adopts the repeal of §§801.20, 801.92 - 801.95, and amendments to §§801.1 - 801.2, 801.11 - 801.19, 801.41 - 801.45, 801.47 - 801.49, 801.51-801.53, 801.72 - 801.73, 801.91, 801.112 - 801.114, 801.142 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.232 - 801.237, 801.262 - 801.268, 801.291 - 801.296, 801.298 - 801.299, 801.331 - 801.332, 801.351, 801.361 - 801.362, 801.364 - 801.365, 801.368 - 801.369 and new §§801.92 - 801.93 concerning the licensure and regulation of marriage and family therapists. Sections 801.2, 801.42, 801.144, 801.173, 801.174, and 801.266 are adopted with changes to the proposed text as published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11843). The repeal of §§801.20, 801.92 - 801.95, amendments to §§801.1, 801.11 - 801.19, 801.41, 801.43 - 801.45, 801.47 - 801.49, 801.51 - 801.53, 801.72 - 801.73, 801.91, 801.112 - 801.114, 801.142 - 801.143, 801.171 - 801.172, 801.201 - 801.204, 801.232 - 801.237, 801.262 - 801.265, 801.267, 801.268, 801.291 - 801.296, 801.298 - 801.299, 801.331 - 801.332, 801.351, 801.361 - 801.362, 801.364 - 801.365, 801.368 - 801.369, and new §§801.92 - 801.93 are adopted without changes and therefore will not be republished.

Effective September 1, 1999, Senate Bill 178, 76th Legislature, 1999, added §2001.039 to the Government Code which will be referred to as §39 and refers to an agency's review of rules. The General Appropriations Act, 76th Legislature (1999) Article IX, §9-10.13 also refers to the review of rules including a notice of intention to review rules. Section 39 generally requires each state agency to review a rule not later than the fourth anniversary of the date on which the rule takes effect and every four years after that date. Each state agency is required to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 801.1 - 801.2, 801.11 - 801.20, 801.41 - 801.54, 801.71 - 801.73, 801.91 - 801.95, 801.111 - 801.114, 801.141 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.231 - 801.237, 801.261 - 801.268, 801.291 - 801.300, 801.331 - 801.332, 801.351, and 801.361 - 801.369 have been reviewed and the board has determined that reasons for adopting the sections continue to exist. Sections 801.46, 801.50, 801.54, 801.71, 801.111, 801.141, 801.231, 801.261, 801.297, 801.300, 801.363, 801.366, and 801.367 were proposed without changes and opened for comments in the proposed preamble published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11843). No comments regarding these section were received. A Notice of Readoption is published in the same issue of the Texas Register as these adopted rules.

The board published a Notice of Intention to Review for §§801.1 - 801.2, 801.11 - 801.20, 801.41 - 801.54, 801.71 - 801.73, 801.91 - 801.95, 801.111 - 801.114, 801.141 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.231 - 801.237, 801.261 - 801.268, 801.291 - 801.300, 801.331 - 801.332, 801.351, and 801.361 - 801.369 in the *Texas Register* on September 17, 1999, (24 TexReg 7774). No comments were received as a result of the publication of the notice.

There were no comments received on the proposed rules during the comment period. However, the department staff made the following changes:

Change: §801.2(1), the phrase "relating to the" was deleted because it was duplicated, and also a comma was deleted after "Chapter 502".

Change: §801.42(8), last sentence, "... Court appointed mediation requires specific training period;" was changed to "...Court appointed mediation requires specialized training;".

Change: §801.144(m), the phrase "...hours of direct clinical services..." was changed to "...hours of clinical services...".

Change: §801.173(1), "a person may apply to take the examination after he/she have:" was changed to "a person may apply to take the examination after he/she has:".

Change: §801.174(d)(1), "the" was capitalized at the beginning of the paragraph to be consistent with paragraph (2).

Change: §801.266(3), "one-half or 7.5 hours of annual continuing education" was changed to "one-half of annual continuing education."

SUBCHAPTER A. INTRODUCTION

22 TAC §801.1, §801.2

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

§801.2. Definitions.

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

(1) Act--The Licensed Marriage and Family Therapist Act relating to the licensing and regulation of marriage and family therapists, Occupations Code, Chapter 502.

(2) Administrative Law Judge (ALJ)--A person within the State Office of Administrative Hearings who conducts hearings under this subchapter on behalf of the Board.

(3) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001.

(4) Associate--A licensed marriage and family therapist associate.

(5) Board--The Texas State Board of Examiners of Marriage and Family Therapists.

(6) Completed application--The official marriage and family therapy application form, fees and all supporting documentation which meets the criteria set out in §801.73 of this title (relating to Required Application Materials).

(7) Contested case--A proceeding in accordance with the APA and this chapter, including, but not limited to, rule enforcement and licensing, in which the legal rights, duties, or privileges of a party are to be determined by the board after an opportunity for an adjudicative hearing.

(8) Department--The Texas Department of Health.

(9) Family systems--An open, ongoing, goal-seeking, self-regulating, social system which shares features of all such systems. Certain features such as its unique structuring of gender, race, nationality and generation set it apart from other social systems. Each individual family system is shaped by its own particular structural features (size, complexity, composition, life stage), the psychobiological characteristics of its individual members (age, race, nationality, gender, fertility, health and temperament) and its socio-cultural and historic position in its larger environment.

(10) Formal hearing--A hearing or proceeding in accordance with this chapter, including a contested case as defined in this section to address the issues of a contested case.

(11) Group supervision--Supervision that involves a minimum of three and no more than six marriage and family supervisees or associates in a clinical setting during the supervision hour. A supervision hour is sixty minutes.

(12) Individual supervision--Supervision of no more than two marriage and family therapy supervisees or associates in a clinical setting during the supervision hour. A supervision hour is sixty minutes.

(13) Investigator--A professional complaint investigator employed by the Texas Department of Health.

(14) License--A marriage and family therapist license, a marriage and family therapist associate license, or a provisional marriage and family therapist license.

(15) Licensed marriage and family therapist--An individual who offers to provide marriage and family therapy for compensation.

(16) Licensee--Any person licensed by the Texas State Board of Examiners of Marriage and Family Therapists.

(17) Licensed marriage and family therapist associate--An individual who offers to provide marriage and family therapy for compensation under the supervision of a board-approved supervisor.

(18) Marriage and family therapy--The rendering of professional therapeutic services to individuals, families, or married couples, singly or in groups, and involves the professional application of family systems, theories, and techniques in the delivery of therapeutic services to those persons. The term includes the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction within the context of therapy.

(19) Month--A calendar month.

(20) Party--Each person, governmental agency, or officer or employee of a governmental agency named by the Administrative Law Judge (ALJ) as having a justiciable interest in the matter being considered, or any person, governmental agency, or officer or employee of a governmental agency meeting the requirements of a party as prescribed by applicable law.

(21) Person--An individual, corporation, partnership, or other legal entity.

(22) Pleading--Any written allegation filed by a party concerning its claim or position.

(23) Regionally accredited institutions--An institution accredited by one of the following accreditation associations will be accepted for licensing purposes: Middle States Association of Colleges and Schools, New England Association of Schools and Colleges, North Central Association of Colleges and Schools, Northwest Association of Schools and Colleges, Southern Association of Colleges and Schools, and Western Association of Schools and Colleges.

(24) Recognized religious practitioner--A rabbi, clergyman, or person of similar status who is a member in good standing of and accountable to a legally recognized denomination or legally recognizable religious denomination or legally recognizable religious organization and other individuals participating with them in pastoral counseling if:

(A) the therapy activities are within the scope of the performance of their regular or specialized ministerial duties and are performed under the auspices of sponsorship of an established and legally cognizable church, denomination or sect, or an integrated auxiliary of a church as defined in Federal Tax Regulations, 26, Code of Federal Regulation 1.6033-2,(g)(5)(i), (1982);

(B) the individual providing the service remains accountable to the established authority of that church, denomination, sect, or integrated auxiliary; and

(C) the person does not use the title of or hold himself or herself out as a licensed marriage and family therapist.

(25) Rules--The rules in this chapter are covering the designated policies and procedures of operation for the board and for individuals affected by the Act.

(26) Supervision--The guidance or management in the provision of clinical services.

(27) Supervisor--A person meeting the requirements set out in §801.143 of this title (relating to Supervisor Requirements), to supervise an associate and/or marriage and family therapist.

(28) Texas Open Meetings Act--Government Code, Chapter 551.

(29) Texas Open Records Act--Government Code, Chapter 552.

(30) Therapist--For the purposes of this chapter, a Texas licensed marriage and family therapist.

(31) Waiver--The suspension of educational, professional, and/or examination requirements for applicants who meet the criteria for licensure under special conditions.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 2001.

TRD-200101646
Marvarene Oliver, Ed.D.
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: April 11, 2001
Proposal publication date: December 1, 2000
For further information, please call: (512) 458-7236

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SUBCHAPTER B. THE BOARD

22 TAC §§801.11 - 801.19

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to

adopt rules concerning the licensure and regulation of marriage and family therapists .

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 2001.

TRD-200101647
Marvarene Oliver, Ed.D.
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: April 11, 2001
Proposal publication date: December 1, 2000
For further information, please call: (512) 458-7236

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22 TAC §801.20

The repeal is adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 2001.

TRD-200101648
Marvarene Oliver, Ed.D.
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: April 11, 2001
Proposal publication date: December 1, 2000
For further information, please call: (512) 458-7236

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SUBCHAPTER C. RENDERING PROFESSIONAL THERAPEUTIC SERVICES AND CODE OF ETHICS

22 TAC §§801.41 - 801.45, 801.47 - 801.49, 801.51 - 801.53

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

§801.42. Rendering Professional Therapeutic Services.

The following are professional therapeutic services which are part of marriage and family therapy when the services involve the professional application of family systems theories and techniques in the delivery of the services:

(1) marriage therapy which utilizes systems, methods, and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to achieve resolution of problems associated with cohabitation and interdependence of adults living as couples through the changing marriage life cycle. These family system approaches assist in stabilizing and alleviating mental, emotional, or behavioral dysfunctions of either partner;

(2) sex therapy which utilizes systems, methods, and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies in the resolution of sexual disorders;

(3) family therapy which utilizes systems, methods, and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, affective, and family systems methods and strategies with families to achieve mental, emotional, physical, moral, educational, spiritual, and career development and adjustment through the changing family life cycle. These family system approaches assist in stabilizing and alleviating mental, emotional, or behavioral dysfunctions of a family member;

(4) child therapy which utilizes systems methods and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, affective and family systems methods and strategies with families to achieve mental, emotional, physical, moral, educational, spiritual, and career development and adjustment through the changing family life cycle. These family system approaches assist in stabilizing and alleviating mental, emotional, or behavioral dysfunctions of a child;

(5) play therapy which utilizes systems, methods, and processes which include play and play media as the child's natural medium of self-expression, and verbal tracking of the child's play behaviors as part of the therapist's role in helping children overcome their social, emotional, and mental problems;

(6) individual psychotherapy which utilizes systems, methods, and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, affective and family systems methods and strategies to achieve mental, emotional, physical, social, moral, educational, spiritual, and career development and adjustment through the developmental life span. These family system approaches assist in stabilizing and alleviating mental, emotional or behavioral dysfunctions in an individual;

(7) divorce therapy which utilizes systems, methods, and processes which include interpersonal, cognitive, cognitive behavioral, developmental, psychodynamic, affective and family system methods and strategies with families to achieve mental, emotional, physical, moral, educational, spiritual, and career development and adjustment through the changing family life cycle. These family system approaches assist in stabilizing and alleviating mental, emotional, or behavioral dysfunctions of the partners;

(8) mediation which utilizes systems, methods, and processes to facilitate resolution of disputes between two or more dissenting parties, including but not limited to any issues in divorce settlements, parenting plan modifications, parent-child conflicts, pre-marital agreements, workplace conflicts, and estate settlements. Mediation involves specialized therapeutic skills that foster cooperative problem solving, stabilization of relationships, and amicable agreements. Court appointed mediation requires specialized training period;

(9) group therapy which utilizes systems methods and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to achieve mental, emotional, physical, moral, educational, spiritual, and career development and adjustment throughout the life span;

(10) chemical dependency therapy which utilizes systems methods and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, affective methods and strategies, and 12-step methods to promote the healing of the client;

(11) rehabilitation therapy which utilizes systems methods and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to achieve adjustment to a disabling condition and to reintegrate the individual into the mainstream of society;

(12) referral services which utilizes systems methods and processes which include evaluating and identifying needs of clients to determine the advisability of referral to other specialists, and informing the client of such judgment and communicating as requested or deemed appropriate to such referral sources. This includes social studies and family assessments of the individual within the family;

(13) diagnostic assessment which utilizes the knowledge organized in the Diagnostic and Statistical Manual of Mental Disorders (DSM) as well as the International Classification of Diseases (ICD) as part of their therapeutic role to help individuals identify their emotional, mental, and behavioral problems when necessary;

(14) psychotherapy which utilizes systems methods and processes which include interpersonal, cognitive, cognitive-behavioral, developmental, psychodynamic, and affective methods and strategies to assist clients in their efforts to recover from mental or emotional illness;

(15) hypnotherapy which utilizes systems methods and processes which include the principles of hypnosis and post-hypnotic suggestion in the treatment of mental and emotional disorders and addictions;

(16) biofeedback which utilizes systems methods and processes which include electronic equipment to monitor and provide feedback regarding the individual's physiological responses to stress. The therapist who uses biofeedback must be able to prove academic preparation and supervision in the use of the equipment as a part of the therapist's academic program or the substantial equivalent provided through continuing education;

(17) assessment and appraisal which utilizes systems methods and processes which include formal and informal instruments and procedures, for which the therapist has received appropriate training and supervision in individual and group settings for the purposes of determining the client's strengths and weaknesses, mental condition, emotional stability, intellectual ability, interests, aptitudes, achievement level and other personal characteristics for a better understanding of human behavior, and for diagnosing mental problems; and

(18) consultation which utilizes systems, methods, and processes which include the application of specific principles and procedures in consulting to provide assistance in understanding and solving current or potential problems that the consultee may have in relation to a third party, whether individuals, groups, or organizations.

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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Marvarene Oliver, Ed.D.
Chairman
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For further information, please call: (512) 458-7236

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SUBCHAPTER D. APPLICATION PROCEDURES

22 TAC §801.72, §801.73

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. CRITERIA FOR DETERMINING FITNESS OF APPLICANTS FOR EXAMINATION AND LICENSURE

22 TAC §§801.91 - 801.93

The amendment and new sections are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

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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22 TAC §§801.92 - 801.95

The repeals are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

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. ACADEMIC REQUIREMENTS FOR EXAMINATION AND LICENSURE

22 TAC §§801.112 - 801.114

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

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. EXPERIENCE REQUIREMENTS FOR EXAMINATION AND LICENSURE

22 TAC §§801.142 - 801.144

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

§801.144. Other Conditions for Supervised Experience.

(a) An associate may practice marriage and family therapy in any established setting under supervision, such as a private practice, public or private agencies, hospitals, etc.

(b) After January 1, 1995, no hours will be counted toward the supervised experience unless the associate was licensed by the board.

(c) A supervisor may not be employed by the person whom he or she is supervising.

(d) A supervisor may not be related within the second degree by affinity (marriage) or within the third degree by consanguinity (blood or adoption) to the person whom he or she is supervising.

(e) During the period of supervised experience, an associate may be employed on a salary basis or be used within an established supervisory setting. The established settings must be structured with clearly defined job descriptions and areas of responsibility. The board may require that the applicant provide documentation of all work experience.

(f) During the post graduate supervision, both the supervisor and the associate may have disciplinary actions taken against their licenses for violations of the rules.

(g) All supervision submitted in fulfillment of the board's requirements must have been on a formal basis arranged prior to the period of supervision. Supervisory arrangements must include all specific conditions agreed to by the supervisor and associate.

(h) If an associate enters into a contract with an organization with which the supervisor is employed or affiliated:

(1) the therapeutic services shall be performed on the site(s) of the organization; and

(2) clients records shall remain the property of the organization.

(i) Group supervised experience of an associate may count toward an associate's supervision requirement only if the supervision group consisted of a minimum of three and no more than six associates during the supervision hour.

(j) Individual supervised experience of an associate may count toward the associate's supervision requirement only if the supervision consisted of no more than two associates.

(k) The 200 hours of supervision must be face-to-face. The associate must receive a minimum of one hour of supervision every two weeks. A supervision hour is 45 minutes.

(l) An associate may have no more than two board-approved supervisors at a time, unless given prior approval by the board or its designee.

(m) If an associate's primary clinical employer has a contract to provide mental health services via telephonic or other electronic media, the associate may receive credit for up to 300 clock-hours toward the required 3,000 hours of clinical services, as approved by the supervisor.

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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Executive Director
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SUBCHAPTER H. LICENSURE EXAMINATIONS

22 TAC §§801.171 - 801.174

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

§801.173. Applying for Examination.

A person must apply for examination in accordance with Subchapter F of this chapter (relating to Academic Requirements for Examination and Licensure) and §801.73 of this title (relating to Required Application Materials). The board shall notify an applicant of application approval or disapproval, and if disapproved, state the reason.

(1) a person may apply to take the examination after he/she has:

(A) submitted the necessary forms, fee, and application in accordance with §801.73 of this title; and

(B) enrolled in or completed on or after September 1, 1999 a graduate internship in marriage and family therapy or an equivalent internship as approved by the board except that a person, who prior to September 1, 1999 enrolled in a graduate internship that has not been completed, has the option of taking the examination as described above in this section or may take the examination after submitting the notarized statement(s) from their supervisor(s) documenting the completion of 1,000 hours of direct clinical contact and the 200 hours of approved supervision.

(2) At least 60 days prior to the examination, the executive director or the executive director's designee shall notify an applicant in writing that an application has been approved.

(3) an applicant who wishes to take a scheduled examination must complete an examination registration form and return it to the board.

§801.174. Examination.

(a) The examination shall be a written examination prescribed by the board which has been validated by an independent testing professional.

(b) An applicant shall apply to take the examination on a form prescribed by the board. The applicant will pay the examination fee at the examination site.

(c) The board, or its designee, shall determine the times and places for licensing examinations and give reasonable public notice.

(d) Examination results shall be reported as follows:

(1) The examinee shall be notified of the results of the examination within 45 days of the examination date.

(2) If the examination results will be delayed more than 60 days after the examination date, the board shall notify each examinee of the reason for the delay within 60 days of the examination date.

(e) Procedures for failure of an applicant to pass an examination are as follows:

(1) An applicant who fails an examination may retake the examination at the next scheduled date.

(2) Fee for the examination is in accordance with subsection (b) of this section.

(3) The applicant must resubmit an application.

(4) The board shall furnish the person who failed the examination with an analysis of that person's performance on the examination if so requested in writing by the examinee.

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SUBCHAPTER I. ISSUANCE OF LICENSE

22 TAC §§801.201 - 801.204

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

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SUBCHAPTER J. LICENSURE RENEWAL AND INACTIVE STATUS

22 TAC §§801.232 - 801.237

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

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SUBCHAPTER K. CONTINUING EDUCATION REQUIREMENTS

22 TAC §§801.262 - 801.268

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

§801.266. Criteria for Approval of Continuing Education Activities.

Each continuing education experience submitted by a licensee will be evaluated on the basis of the following criteria.

(1) Attendance at programs shall be in accordance with §801.264 of this title (relating to Types of Acceptable Continuing Education).

(2) Completion of academic work shall be in accordance with §801.264 of this title. Official graduate transcripts from an accredited school showing completion of graduate hours in appropriate areas for which the licensee received at least a grade of "B" or "pass" is required.

(3) Credit may be earned for clinical supervision of marriage and family therapy interns and associates. Supervision may count for no more than one-half of annual continuing education.

(4) A presenter of a continuing education activity or an author of a published work which enhances a marriage and family therapist's knowledge or skill may be granted five credit hours for each presentation or publication not to exceed one-half of the annual continuing education required.

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 L. COMPLAINTS AND VIOLATIONS

22 TAC §§801.291 - 801.296, 801.298, 801.299

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

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SUBCHAPTER M. LICENSING OF PERSONS WITH CRIMINAL BACKGROUNDS

22 TAC §801.331, §801.332

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

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SUBCHAPTER N. SETTLEMENT CONFERENCES

22 TAC §801.351

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists.

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SUBCHAPTER O. FORMAL HEARINGS

22 TAC §§801.361, 801.362, 801.364, 801.365, 801.368, 801.369

The amendments are adopted under the Texas Occupations Code, §502.152 which provides the Texas State Board of Examiners of Marriage and Family Therapists the authority to adopt rules concerning the licensure and regulation of marriage and family therapists .

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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Chairman

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 40. MEDICAL TRANSPORTATION

On behalf of the State Medicaid Director, the Texas Department of Health (department) adopts repeals §§40.1, 40.101 - 40.105, 40.201 - 40.202, 40.301- 40.305, 40.402, 40.405 - 40.408, 40.501 - 40.503, 40.601- 40.602, and 40.701 - 40.702 and new §§40.1, 40.101 - 40.106, 40.201, 40.301 - 40.304, 40.401 - 40.405, 40.501 - 40.502, and 40.601 - 40.603 concerning the Medicaid Transportation Program (MTP). New §§40.1, 40.101-40.103, 40.201, 40.301 - 40.302, and 40.304 are adopted with changes to the proposed text as published in the October 27, 2000, issue of the *Texas Register* (25 TexReg 10654). The repeals of §§40.1, 40.101 - 40.105, 40.201 - 40.202, 40.301 - 40.305, 40.402, 40.405 - 40.408, 40.501- 40.503, 40.601 - 40.602, and 40.701 - 40.702 and new §§40.104 - 40.106, 40.303, 40.401 - 40.405, 40.501 - 40.502, 40.601 - 40.603 are adopted without changes and those sections will not be republished.

Government Code §2001.039 requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules on this subject are needed; however, the rules required revision as described in this preamble.

The department published a Notice of Intention to Review the sections which was published in the February 12, 1999, issue of the *Texas Register* (24 TexReg 1002). There were no comments received regarding the publication of this notice.

Specifically, these new sections cover definitions, the availability of program services, client and trip eligibility criteria, client and contractor rights and responsibilities, contractor sanctions, program limitations and exclusions, provider participation requirements, accident and abusive behavior reports, billing, confidentiality of records, audits and audit resolution, monitoring activities, compliance, liability, contract expiration or termination, and provisions which govern subcontractors.

Comments received during the comment period consisted of requests for clarifying language, adding new definitions, rewording sentences to be clear on the statement, correction on the name of a program, correcting and changing references, adding a requirement to the contractor participation section, and expanding a rule to include a limit for receiving MTP services.

The department is making the following minor changes due to staff comments to clarify the intent and improve the accuracy of the sections.

Change: Concerning §40.1(8), the sentence has been reworded for clarity.

Change: Concerning §40.1, paragraphs (13)-(47) have been renumbered, due to the addition of new §40.1(13).

Change: Concerning proposed §40.1(21), the word "Texas" has been added to identify which state, also renumbered as §40.1(22).

Change: Concerning §40.101(a), the word "respective" has been deleted and the term "health services" has been changed to "health care services".

Change: Concerning §40.101(b)(4), a typographical error, "CHCSN-CIDC", has been corrected to "CSHCN-CIDC".

Change: Concerning §40.101(5)(B), the word "This" has been added to clarify the sentence.

Change: Concerning §40.101(b)(11), a semi-colon has been replaced with a period to end the section.

Change: Concerning §40.102(3), the word "attendant" has been pluralized to allow more than one person to act in this capacity. A semi-colon has also been inserted to separate the sentence, and the word "or" has been inserted to clarify the sentence.

Change: Concerning §40.102(7)(A)-(C), the process has been expanded to include a limit of time that a client may receive services for medical necessity without proof of residency.

Change: Concerning §40.103(5), the sentence has been rewritten to allow for reimbursement when the facility is the client's choice and the treatment is deemed by the department to be appropriate for the condition.

Change: Concerning §40.201(a)(1), (a) has been deleted from the 29 U.S.C.A.§794 reference.

Change: Concerning §40.301, a new requirement has been added that ensures MTP staff are informed when a client's actions are such that appropriate authorities are called and the client is not transported to the authorized origin or destination. This new requirement is now found in new §40.301(a)(5).

Change: Concerning §40.301(a)(3), a new requirement has been added that ensures contractors also wait for the client ten minutes beyond the scheduled time of the pick up trip.

Change: Concerning §40.301(a)(9), now renumbered §40.301(a)(10), the words "of the vehicle" have been added to clarify the position of the identification of the contracting entity on the outside of the vehicle.

Change: Concerning §40.301(a)(10), now renumbered §40.301(a)(11), the word "the" has been changed to "this" in order to clarify the statement.

Change: Concerning §40.301(a)(14), now renumbered §40.301(a)(15), parenthesis surrounding the complete sentence have been deleted to clarify the intent of the insurance.

Change: Concerning §40.301(c), the word "vehicle" has been added to clarify what type of license tags are required.

Change: Concerning §40.301(d), a typographical error "judgements" has been corrected with "judgments".

Change: Concerning §40.302, the sentence concerning subcontracting has been reworded for better understanding.

Change: Concerning §40.304(a), the words "law enforcement officers" have been deleted and replaced by the term "the appropriate authorities".

Change: Concerning§40.304(b), the words "local law enforcement" have been deleted and replaced by the term "the appropriate authorities".

The following comments were received concerning the rules. After each comment is the department's response.

Comment: Concerning §40.1, one commenter suggested that because the definition section includes an entry for "origin", there should also be a definition for "destination".

Response: The department agrees. The term "destination" has been added and defined and the definitions renumbered to reflect this addition in §40.1(13).

Comment: Concerning proposed §40.1(14) and (24), one commenter suggested that Children Health Insurance Program (CHIP) children should be included in this definition.

Response: The department disagrees. CHIP children are not identified as a separate category. Phase I CHIP clients are regular Medicaid clients and would be entitled to MTP services. Phase II CHIP clients are not Medicaid eligible and therefore are not eligible to receive MTP services. No changes were made as a result of this comment.

Comment: Concerning §40.1(14), one commenter suggested that this definition would be more compatible with the original Federal Court Order in 1974 and HCFA's Medical Assistance Manual (MAM) if it included the words "who have no other means of transportation to the health service".

Response: The department disagrees. This definition includes clients not required to meet this criteria. No changes were made as a result of this comment.

Comment: Concerning proposed §40.1(32), renumbered as §40.1(33), one commenter suggested it might be better to rephrase part of this definition. The commenter suggested adding "must be submitted and approved for any additional services".

Response: The department agrees. The suggested language has been added.

Comment: Concerning proposed §40.1(33), renumbered as §40.1(34), one commenter was concerned that this rule could have a negative impact on the economy and hospitals/medical clinics/physicians by allowing clients in rural counties to bypass the medical providers in their county for routine medical treatment.

Response: The department disagrees. The rule allows for Managed Care clients to seek and obtain treatment with their designated health care provider that may be out of the rural area. No change was made as result of this comment.

Comment: Concerning this same proposed rule, §40.1(33), renumbered §40.1(34), the same commenter also wonders whether or not it was reasonable to allow residents of large cities with numerous medical facilities in counties like Dallas, Tarrant, Harris and Galveston to be transported out of their county of residence.

Response: The department disagrees. MTP staff authorizes reasonable transportation of an eligible client to and/or from a covered health care service. If reasonable transportation is questionable, MTP staff require a statement from a health care provider on medical necessity. No change was made as a result of this comment.

Comment: The same commenter felt that §40.1(36), renumbered §40.1(37) contradicted §40.1(33), renumbered §40.1(34) and that §40.1(36), renumbered §40.1(37) seemed more compatible with the original Federal Court Order in 1974 and HCFA's MAM.

Response. The department disagrees. Renumbered paragraph (34) and renumbered paragraph (37), pertain to different transportation services. Renumbered paragraph (34) pertains to clients traveling outside their county, while renumbered paragraph (37) pertains to clients traveling within their county. No changes were made as a result of this comment.

Comment: Concerning proposed §40.1(47), renumbered as §40.1(48), one commenter suggested that because there are two time zones in Texas, (CST) should be omitted.

Response. The department agrees. Central Standard Time (CST) has been omitted and the change is reflected in this section.

Comment: Concerning §40.101(a), one commenter suggested adding CHIP children to the list of eligible recipients.

Response: The department disagrees. CHIP children are not identified as a separate category. Phase I CHIP clients are regular Medicaid clients and would be entitled to MTP services. Phase II CHIP clients are not Medicaid eligible and therefore are not eligible to receive MTP services. No changes were made as a result of this comment.

Comment: Concerning §40.102(7), one commenter was concerned that the use of the singular form "attendant" could limit a client to one attendant. The commenter remarked that sometimes a child's condition or parent/guardian's inability to communicate necessitates more than one attendant.

Response: The department agrees. "Attendant" was changed to attendant(s) throughout §40.102.

Comment: Concerning §40.105(3)(A), one commenter suggested that because regional MTP staff determine all eligibility, the rule should not require that client to provide written consent to the transportation contractor since the original written consent document should probably be on file in the regional MTP office.

Response. The department disagrees. Omitting the requirements to provide a copy of the consent document to the transportation contractor could delay transportation services to the client. No changes were made a result of this comment.

Comment: Concerning §40.106(2), a commenter requested that the section be amended to reduce the amount of funds provided to small children.

Response: The department disagrees. The rule to provide $25 per day, with pro rata reimbursement, for less than a full day to all Texas Medicaid THSteps recipients and their attendant(s), effective May 1, 1997, was the result of a Federal Court Order signed on May 19, 1997, by William Wayne Justice, United States District Judge. No changes were made as a result of this comment.

Comment: Concerning the same rule, §40.106(2), the commenter then suggested that food be an allowance for all adults not just THSTeps Medicaid recipients. The commenter expressed concern that adults excluded from benefits that younger Medicaid recipients received could constitute discrimination.

Response: The department disagrees. The federal regulations state that a state plan has to specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers and describe the methods that the agency will use to meet this requirement. It does not dictate how the state provides medical transportation - only that it does. OBRA '89 created the EPSDT (now known as THSteps) Program to serve children under the age of 21. Food allowance is provided under §42 USCA 1396(a)(5) which states: Such other necessary health care, diagnostic services, treatment, and other measures described in §1905(a) to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State Plan. No changes were made a result of this comment.

Comment: Concerning §40.201(b)(6), one commenter suggested that in addition to the actual client, a parent, or a legal guardian of the client should also be able to cancel the trip.

Response: The department agrees. Language was added to include responsible adult as authorized to cancel the client's transportation.

Comment: Concerning §40.201(b)(6), one commenter suggests that "scheduled appointment" should be changed to "authorized trip" as in some cases, the scheduled appointment is the day after the authorized trip. The commenter also suggested that notice be provided "within 48 hours prior to the time of the authorized trip".

Response: The department agrees. The rule has been amended to reflect these changes.

Comment: Concerning proposed §40.301(a)(19), renumbered §40.301(a)(20), one commenter expressed concern that this rule was incompatible with §40.304(a) because renumbered §40.301(a)(20) does not require the contractor to notify the authorities.

Response: The department agrees. Notification language has been added to renumbered §40.301(a)(20). Paragraph (5) has been added to §40.301(a) in order to ensure the department is made aware when clients are not returned to their authorized origin or destination when authorities have been called.

Comment: Concerning §40.405(b), one commenter suggested that the use of the term "the contractor" was too general and remarked that it should be defined as a person with the authority to bind the contractor legally.

Response. The department disagrees. The person with the authority to bind the contractor legally may authorize the contractor to conduct the actual business. No changes were made as a result of this comment.

Comment: Concerning the repeal of §40.602, Sanctions, the commenter suggested that the deletion of this section would encourage irresponsibility on the part of many MTP clients and could result in penalizing other clients, disrupting transportation and physician schedules and cost taxpayers unnecessary dollars. The commenter suggested amending this section to reflect lesser sanctions would be a better alternative.

Response: The department disagrees. The department has opted to take remedial actions rather than punitive measures. Punitive sanctions could deprive Medicaid beneficiaries of their entitlement to services. The department will address means for remedial actions in its Medical Transportation Program Policies and Procedures Handbook. No changes were made as a result of this comment.

Two individuals had questions and suggestions for changes, but were neither for nor against the rules in their entirety.

SUBCHAPTER A. PROGRAM OVERVIEW

25 TAC §40.1

The repeal is adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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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The new section is adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

§40.1. Definitions of Terms.

The following words and terms, when used in the Medical Transportation Program (MTP) rules, shall have the following meanings, unless the content clearly indicates otherwise.

(1) Abuse--The willful infliction of intimidation or injury resulting in physical harm, pain, or mental anguish.

(2) Adjacent county(ies)--The county or counties next to the client's county of residence.

(3) Advance funds--Funds authorized by Regional MTP staff in advance of travel and provided to a client or attendant for a medically-necessary health care service.

(4) Attendant--An individual, translator, other assistant or service animal that accompanies an eligible client.

(5) Batch--A group of mass-transit tickets or tokens with one unique confirmation number.

(6) Cancellation--Verbal or written notification from a client, a client advocate, or contractor prior to the scheduled medical transportation service which indicates that the particular service is not needed.

(7) Certification Period--A period of time for which service is certified.

(8) Children with Special Health Care Needs-Chronically Ill and Disabled Children (CSHCN-CIDC)--A department program funded with general revenue and federal funds. Services for eligible children include early identification, diagnosis and evaluation, resulting in early health care intervention.

(9) Contractor--An individual, a for-profit business, a non-profit organization, or a governmental unit that has entered into a legally binding contract with the department to provide authorized MTP transportation services, advance funds, meals and/or lodging to eligible clients.

(10) Curb-to-curb service--Transportation from curb at origin to curb at destination. This service includes providing assistance, as required, to passengers entering and exiting the vehicle.

(11) Department--Texas Department of Health. The State agency that operates the Medical Transportation Program under Title XIX of the Social Security Act.

(12) Dependent care--Necessary care for a child or disabled adult.

(13) Destination--The place or point to which a client has been authorized by MTP to travel.

(14) Door-to-door service--Transportation from the door of the trip origin to the door of the trip destination as authorized by Regional MTP staff. This service includes providing assistance, as required, to passengers entering and exiting the vehicle.

(15) Eligible MTP client--A person enrolled in Medicaid, Children with Special Health Needs (CSHCN-CIDC), or the Transportation for Indigent Cancer Patients (TICP) programs.

(16) Fraud--Deliberate misrepresentation or intentional concealment of information in order to obtain services or payment for services to which a person or contractor is not entitled.

(17) Health-Care Provider's Statement of Need--A written statement or MTP form submitted by a health care provider which documents the client's need for health services.

(18) Hotel--An establishment that provides overnight lodging.

(19) Individual contractor (IC)--A person who contracts with the department for mileage reimbursement at a prescribed rate to provide transportation for an eligible client to a covered health care service.

(20) Lock-in--An action taken by the department to restrict the individual's choice of providers.

(21) Mass transit--Transportation that is subsidized by sales taxes or Federal Transit Administration funds and provided to the general public within a predetermined local area.

(22) Medicaid--A health care program provided to eligible individuals under Title XIX of the federal Social Security Act and the Texas Human Resources Code, Chapter 32.

(23) Medicaid-allowable service--A service covered under the State's Medicaid Plan for which a client is eligible. This includes health care services that are provided to the client by a charitable organization but not billed to Medicaid as well as value-added services provided by a Medicaid managed care plan to a Medicaid-enrolled member.

(24) Medically necessary--services that are:

(A) reasonably necessary to: prevent illness(es) or medical condition(s); maintain function or to slow further functional deterioration; provide early screening, intervention, care, and/or provide care or treatment for eligible recipients who have medical condition(s) that cause suffering or pain, physical deformity or limitations in function, or that threaten to cause or worsen a disability, illness or infirmity, or endanger life;

(B) provided at appropriate locations and at the appropriate levels of care for the treatment of the medical condition(s);

(C) consistent with health care practice guidelines and standards endorsed by professionally recognized health care organizations or governmental agencies;

(D) consistent with the diagnosis(es) of the condition(s); and

(E) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency.

(25) Medical Transportation Program (MTP)--A program which provides non-emergency transportation services to and from health care services for persons enrolled in Medicaid, CSHCN-CIDC, or TICP who have no other means of transportation to the health service.

(26) Minor--An individual under 18 years of age who has never been married or emancipated by court ruling.

(27) No show--

(A) a client who does not respond within ten minutes of the time the contractor arrives at the designated pick-up point and scheduled time and announces its presence; or

(B) a contractor who fails to arrive at the designated pick-up point and time.

(28) One-way trip--Transportation of a passenger from point-of-origin to destination.

(29) On-time--Contractor arrives at the health care facility no more than one hour prior to the MTP client's scheduled medical appointment time and returns for pick up no later than one hour after the scheduled return trip time.

(30) Origin--The location at which the contractor is authorized to pick up the client.

(31) Overnight stay--A service enabling a client to remain beyond the date of MTP transportation at a health care facility located outside the client's city of residence.

(32) Passenger assistance--Assistance which enables a client to walk, enter or exit a vehicle, or transfer from a wheelchair. This does not include lifting or carrying a person.

(33) Prior authorization--Authorization or approval for the delivery of certain services obtained from the department or its designee before the services are rendered. Prior authorized services may be limited in duration, scope, and amount. Services provided beyond those authorized are not reimbursable by MTP. If a prior authorization is limited in duration, scope or amount, a separate request must be submitted and approved for any additional services.

(34) Reasonable transportation--Transportation within a client?s county of residence, or to an adjacent county, using the most cost-effective transportation that meets the client's medical needs.

(35) Rescheduled authorized trips--Authorized trips postponed by a contractor because of scheduling conflicts and/or seating capacity limitations.

(36) Retroactive payments--Payments made to a contractor for eligible services which would have been authorized had they been requested prior to the service.

(37) Routine medical transportation--Authorized medical transportation of eligible clients to and/or from the nearest facility where health care needs will be met.

(38) Same-day service--An urgent request authorized by MTP staff.

(39) Sanctions--Disciplinary action against an MTP contractor for validated infractions of program rules, policies, or contract terms.

(40) Scheduling--Authorized medical transportation arranged for clients by contractors to ensure the client's timely arrival at health care services on or before the scheduled medical appointment.

(41) Service animal--A guide dog or a signal dog trained to provide assistance to an individual with a disability.

(42) Sexual harassment--Unwelcome sexual advances, requests for sexual favors, or other unwanted verbal or physical conduct of a sexual nature directed toward a person by another individual during the provision of MTP services.

(43) Special medical transportation--Medical transportation to and/or from a health care facility beyond the county adjacent to the client's county of residence.

(44) Subcontractor--An individual, for-profit business, non-profit organization, or governmental unit that has entered into a legal contract with the department's MTP contractor to provide transportation services, advance funds, meals, and/or lodging to eligible clients authorized by Regional MTP staff.

(45) Transportation for Indigent Cancer Patients (TICP) Program--A state-funded program that provides medical transportation services to clients diagnosed with cancer or a cancer-related illness and who meet certain residency and financial criteria.

(46) Urgent--A request for same-day transportation service.

(47) Usual and customary charge--The fee a contractor customarily charges the general public for a service.

(48) Workday--Normal department operating hours from 8:00 a.m. - 5:00 p.m. Monday through Friday with the exception of state and federal holidays.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. ELIGIBILITY FOR PROGRAM SERVICES

25 TAC §§40.101 - 40.105

The repeals are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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SUBCHAPTER B. ELIGIBILITY, PROGRAM SERVICES, PROCESSES, LIMITATIONS, AND EXCLUSIONS

25 TAC §§40.101 - 40.106

The new sections are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

§40.101. Eligibility.

(a) The following recipients are eligible to receive medical transportation services if no other means of transportation are available to the health care service:

(1) clients who are enrolled in Medicaid;

(2) CSHCN-CIDC clients; and

(3) TICP clients.

(b) Transportation for Indigent Cancer Patients (TICP) - To be determined eligible by the department for participation in the TICP Program, the client:

(1) must reside in Webb, Zapata, Starr, Jim Hogg, Hidalgo, Cameron, Willacy, or Nueces County and provide one of the following as proof of residency:

(A) copy of federal or state ID (driver's license or identification card); or

(B) copy of utility bill under the applicant's name.

(2) if residing with a family member, shall obtain from the family member, written verification that the applicant resides in the household and provide proof that household is in an eligible county;

(3) must not be eligible for Medicaid;

(4) must not be eligible for CSHCN-CIDC;

(5) must be medically indigent (at or below 100% of federal poverty guidelines). Before program services are provided, the monthly household gross income shall be verified by:

(A) financial information obtained through the Texas Department of Human Services;

(B) check stub or other written verification for each person in the household who is employed. This form must contain the name, address of employer, income and dates covered for each pay period; or

(C) award letter or other written verification of unearned income (such as Social Security, Worker's Compensation, Unemployment or Veteran's Administration benefits);

(6) is permitted the following allowable deductions from the total household gross income:

(A) $120 standard deduction per person in household who is employed (the standard deduction per person will be the rate set by the Texas Department of Human Services);

(B) dependent care:

(i) up to $200 per child under 2 years of age; or

(ii) up to $175 per child 2 years of age and older.

(7) is not permitted to take deductions on unearned income;

(8) if over the age of 18 and residing with a family member, the family member's household income is not considered. The applicant's gross income, less standard deductions, is used to determine the applicant's eligibility;

(9) has zero income and shall therefore submit letters from two individuals that attest to the applicant's current financial status;

(10) must provide initial confirmation of cancer or cancer-related diagnosis by a licensed medical physician. The following restrictions apply:

(A) the applicant is eligible for up to 4 diagnostic visits to a licensed medical physician to determine cancer or cancer-related diagnosis if the department is provided written verification that diagnostic visits are to rule out the possibility of cancer or cancer-related illness;

(B) confirmation of cancer or cancer-related diagnosis must be provided on or following the last diagnostic visit for MTP services to continue;

(11) must be accepted for evaluation or treatment by a medical institution in Texas capable of providing quality cancer services.

§40.102. Program Services.

Medical Transportation Program (MTP) services must be authorized by Regional MTP staff. MTP services include the following:

(1) reasonable transportation of an eligible client to and/or from a covered health care service;

(2) special medical transportation to a health care facility when one of the following conditions is met:

(A) the services are allowable and the health care provider will not bill Medicaid or another source for the cost of the services; or

(B) the client provides Regional MTP staff with a Health Care Provider's Statement of Need;

(3) transportation for an attendant(s); if the health-care provider documents the need, the client is a minor, or a language or other barrier to communication or mobility exists that necessitates such assistance;

(4) transportation for a service animal when accompanying a client;

(5) retroactive reimbursement for up to three months of reasonable transportation, meals and lodging if the client is eligible under program health-eligibility requirements. Retroactive reimbursement will begin on the date of the request for retroactive reimbursement;

(6) advance funds for an eligible child and attendant(s) when lack of transportation funds will prevent the child from traveling to receive health care services; and

(7) reimbursement or advance funds for an eligible child and attendant(s) for meals and lodging when the health care service requires the child to remain overnight for six consecutive months. After six months, the client or responsible party must provide proof of residency by providing:

(A) copy of federal or state ID (driver's license or identification card); and

(B) copy of a utility bill under the client's or responsible party's (if client is a child) name;

(C) if residing with a family member, written verification that the applicant resides in the household.

§40.103. Program Processes.

To ensure transportation for eligible clients to a health care facility:

(1) a request for routine medical transportation must be received by the Regional MTP staff at least two workdays in advance of the client's health care service appointment;

(2) a request for special medical transportation must be received by the Regional MTP staff at least five workdays in advance of the client's health care service appointment;

(3) exceptions to paragraphs (1) and (2) of this section may be granted by the Regional MTP manager or designee when the circumstances have been determined by the Regional MTP manager or

designee to be beyond the client's control. The exception will be documented in the client's record;

(4) clients with a chronic health condition, which requires recurring visits to a provider, may receive multiple mass transit tickets;

(5) an individual contractor(s) may receive reimbursement that exceeds the amount paid to other transportation contractors for transportation to a similar facility when the facility is the client's choice and/or the facility is deemed by the department to be appropriate for the health care service required;

(6) a TICP certification period may be retroactive to the date of the initial request for MTP services if all eligibility requirements are met, and all forms are completed and returned. The duration of the certification period is a maximum of 12 consecutive months and minimum of 60 days; and/or

(7) specific certification periods apply to the following applicants:

(A) applicants on unearned fixed income such as Social Security, worker's compensation, unemployment or U.S. Department of Veterans Affairs benefits can be certified for a 12 month period if there are no anticipated changes in household income;

(B) applicants with earned income can be certified up to an 8-month period if there are no anticipated changes in household income;

(C) applicants whose unearned or earned household income is within 10% of the federal poverty guideline can be certified up to a 6-month period at a time if there are no anticipated changes in household income; or

(D) applicants who have zero income can be certified up to 2 months at a time. Zero income requires written verification from family members or advocates who can attest that the household receives no monthly earned or unearned income.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. PROGRAM SERVICES LIMITATIONS

25 TAC §40.201, §40.202

The repeals are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07

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SUBCHAPTER C. CLIENT RIGHTS

25 TAC §40.201

The new sections are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

§40.201. Client Rights and Responsibilities.

(a) Client Rights.

(1) Nondiscrimination. The client has a right to receive services in compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000d, et seq.; §504 of the Rehabilitation Act of 1973, 29 U.S.C.A. §794 ; the Americans with Disabilities Act of 1990, 42 U.S.C.A. §12101, et seq.; and all amendments to each, and all requirements imposed by the regulations issued pursuant to these Acts, in particular 45 CFR Part 80 (relating to race, color, national origin), 45 CFR Part 84 (relating to handicap), 45 CFR Part 86 (relating to sex), and 45 CFR Part 91 (relating to age).

(2) Abuse report. Clients should report verbal or physical abuse or sexual harassment committed by other clients or passengers, contractor employees, or department staff to Regional MTP staff or Regional Management staff upon arrival at the client's destination.

(3) Denial notification. If services are denied, Regional MTP staff shall notify the client verbally and in writing no less than 30 days before the department intends to terminate services. This notification must contain information listed in Chapter 36, Subchapter C, §36.21 of this title (relating to Recipient Notice and Fair Hearing Request). This notification does not apply to clients under §40.106 of this chapter (relating to Program Exclusions).

(4) Appeal request. A client whose services have been denied may request an administrative review by the Regional MTP Manager or may appeal the administrative review decision or the service denial by requesting a formal hearing. Unless otherwise specified, a request for a formal hearing should be in writing and mailed or hand-delivered to the appropriate Regional MTP office.

(b) Client Responsibilities.

(1) When a client or responsible adult requests transportation, he/she must provide Regional MTP staff with the following information:

(A) client name, address, and, if available, the telephone number;

(B) Medicaid, TICP or CSHCN-CIDC client identification number (if applicable), Social Security number, and date of birth;

(C) name, address, and telephone number of health care provider and/or referring health-care provider;

(D) purpose and date of trip and time of appointment;

(E) affirmation that other means of transportation are unavailable;

(F) special needs, including wheelchair lift or attendant(s);

(G) medical necessity verified by the Health Care Provider's Statement of Need, if applicable; and

(H) affirmation that advance funds are needed in order for the client to travel to a health care facility, if applicable;

(2) Clients must refrain from verbal and/or physical abuse or sexual harassment toward another client or passenger, contractor's employees, or department employees while requesting or receiving medical transportation services.

(3) Clients must safeguard all bus tickets and/or tokens from loss and theft and must return unused tickets or tokens to the Regional MTP office issuing the tickets or tokens.

(4) Clients who receive mass-transit bus tickets or tokens must complete the department's Mass Transit verification form. Clients must return this verification form prior to their next request for tickets or tokens. A letter from the health care provider verifying delivery of services may be substituted for the disbursement of mass transit tickets or tokens verification form. Exceptions to this documentation may be granted by a Regional MTP Manager or MTP-designated supervisor when circumstances occur that are beyond the client's control. Exceptions will be documented in the client's record.

(5) Clients must not use authorized medical transportation for purposes other than travel to and from covered health care services.

(6) If the client does not need to use the authorized transportation services, the client or the responsible adult should contact the Regional MTP staff to cancel the particular trip within 48 hours prior to the time of the authorized trip.

(7) Clients who receive advance funds for meals, lodging, and/or travel must return a completed Individual Contractor (IC) Service Record verifying services were provided, prior to receiving future advance funds or reimbursements. A letter from the health care provider verifying services were provided may be substituted for the IC service record. Exceptions to this documentation may be granted by a Regional MTP manager when circumstances occur that are beyond the client's control. Exceptions will be documented in the client's record.

(8) Clients must cancel requests for advance funds or lodging when not needed.

(9) Clients must provide appropriate receipts when seeking reimbursement for lodging.

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SUBCHAPTER D. PROVIDER PARTICIPATION

25 TAC §§40.301 - 40.305

The repeals are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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SUBCHAPTER D. CONTRACTOR PARTICIPATION

25 TAC §§40.301 - 40.304

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§40.301. Transportation Contractor Participation Requirements.

(a) To participate in MTP, all contractors and their subcontractors must:

(1) ensure that urgent trips, as determined by Regional MTP staff, are provided on the originally authorized date, which could include same-day service;

(2) provide routine medical transportation one-way trips authorized by Regional MTP staff if the contractor receives the authorization at least one workday before the client's appointment date and/or time;

(3) ensure that eligible clients and attendants are picked up at the point of origin curb and dropped off at the destination curb when curb-to-curb service has been arranged. A contractor must wait for the client ten minutes beyond the scheduled time of the pick up trip. Following this ten minute wait, if the client does not board the vehicle, the client may be declared a no-show for the transportation service. The contractor must notify Regional MTP staff of the no-show the following workday;

(4) ensure that clients arrive at and depart from health care appointments on time. A contractor must wait for the client ten minutes beyond the scheduled time of the return trip. Following this ten-minute wait, if the client does not board the vehicle, the client may be declared a no-show for the transportation service. The contractor must notify Regional MTP staff of the no-show the following workday;

(5) inform Regional MTP staff when a client is not transported to the client's authorized origin or destination because appropriate authorities have been contacted;

(6) ensure that drivers consider the comfort of the clients and make reasonable rest stops as requested by clients;

(7) provide passenger assistance necessary to ensure that clients enter and exit vehicles safely. If a contract specifies door-to-door service, assist the passenger to and from the doors at the trip origin and destination;

(8) ensure that members of the contractor's staff identify themselves as Texas Department of Health, Medical Transportation Program contractors when communicating with clients concerning trips authorized by Regional MTP staff;

(9) ensure that all contractor employees are made aware of client rights and responsibilities;

(10) ensure that vehicles used for MTP services are identified on the outside of the vehicle with the contracting entity's name;

(11) ensure that all drivers, clients, and attendants observe the Texas safety-belt law for any motor vehicle subject to this law. Children under two years of age must use child-safety seats that are manufactured according to federal standards, and children who are four years of age or older must use safety belts. Children ages two to three years of age may be secured in either a safety seat or a safety belt. Additional details are specified in Transportation Code §§545.412 and 545.413;

(12) use clean vehicles that meet federal, state, and local government requirements for safe operation;

(13) comply with the terms and conditions set forth in local, federal, and state laws and regulations governing medical transportation services provided under Title XIX of the Social Security Act, 42 U.S.C.A. §§1396, et seq., and with department rules, policies, procedures, and guidelines;

(14) comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000d, et seq.; the Rehabilitation Act of 1973 §504, §29 U.S.C.A. §794; the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§12101, et seq.; and all amendments to each, and all requirements imposed by the regulations issued pursuant to these Acts, in particular 45 CFR Part 80 (relating to race, color, national origin), 45 CFR Part 84 (relating to handicap), 45 CFR Part 86 (relating to sex), and 45 CFR Part 91 (relating to age). In addition, the contractor agrees to comply with the Health and Safety Code §85.113 (concerning workplace and confidentiality guidelines regarding AIDS and HIV);

(15) carry and continue to have in full force and effect vehicle insurance policy(ies) covering damages for liability (arising out of the contractor's ownership, maintenance or use of a motor vehicle used in providing a service unit as defined in this contract including coverage of personnel of any state or federal agency who are passengers in such a vehicle for purposes of monitoring and auditing the performance of this contract) in amounts which are equal to or exceed that required by Texas law, rules issued pursuant to Texas law, or by any local government entity. If a contractor's insurance is canceled, the contractor must not transport any client and must inform the Regional MTP manager or designee upon cancellation;

(16) employ drivers who meet federal, state, local government qualifications for safe operation of vehicles they drive;

(17) ensure that drivers have not received citations for more than two moving violations either on or off the job for the past twelve months. Upon request by Regional MTP representative(s), the contractor will furnish verification of Texas Department of Public Safety driving records of the drivers employed during the contract period;

(18) ensure that all drivers receive appropriate training as specified in the contract with the department. Documentation of this training must be maintained in the contractor's records and available for review upon request by a Regional MTP manager;

(19) ensure that neither drivers nor passengers are allowed to use tobacco products while on board vehicles;

(20) ensure that clients are transported back to the point of origin unless the contractor believes the safety of the driver, clients, or others is in jeopardy. If a client appears to be dangerous to himself or others, the contractor shall notify the appropriate authorities; and

(21) ensure that drivers comply with all federal, state and local traffic laws and ordinances.

(b) Individual contractors must sign an Individual Contractor Agreement with the department to acquire participation status. The department may reject any request for participation in MTP and cancel any existing agreement.

(c) Individual contractors must have and maintain a current driver's license, current vehicle insurance, current vehicle inspection sticker and current vehicle license tags to participate as an individual contractor.

(d) The contractor, as an independent contractor, agrees to hold the department and/or federal government harmless and to indemnify them from any and all liability, suits, claims, losses, damages and judgments, and to pay all costs, fees, and damages to the extent that such costs, fees, and damages arise from performance or non-performance of the contractor under the contract. Contractors may seek private legal counsel regarding questions of liability.

§40.302. Subcontractors.

Contractors shall refrain from entering into any contract(s) with subcontractor(s) for services without providing a written request to the department's MTP Central Office Director. The department's MTP Central Office Director has the right to review and approve subcontracting agreements. A contractor shall not transfer, assign or sell its interest in the MTP contract without the prior written consent of the department's MTP Central Office Director. The contractor agrees that it shall be responsible to the department for the performance of any subcontractor.

§40.304. Contractor Reporting Abuse.

(a) Allegations of fraud or program abuse, sexual harassment or physical or verbal abuse committed by an MTP client during trips authorized by Regional MTP staff, shall be made in writing to Regional MTP staff within five workdays of each incident. If the contractor believes the safety of the driver, clients, or others is in jeopardy or if a client appears to be dangerous to himself or others, the contractor shall notify the appropriate authorities.

(b) If the contractor witnesses or suspects child or adult abuse or neglect, the contractor must report it immediately to the Texas Department of Protective and Regulatory Services? (TDPRS) abuse hotline or the appropriate authorities.

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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For further information, please call: (512) 458-7236

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SUBCHAPTER E. PAYMENT PROCEDURES AND RECORDKEEPING

25 TAC §§40.401 - 40.405

The new sections are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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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25 TAC §§40.402, 40.405 - 40.408

The repeals are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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SUBCHAPTER F. MONITORING AND EVALUATION

25 TAC §§40.501 - 40.503

The repeals are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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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25 TAC §40.501, §40.502

The new sections are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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. CONTRACT TERMINATION AND EXPIRATION

25 TAC §40.601, §40.602

The repeals are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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. CONTRACT TERMINATION AND SANCTIONS

25 TAC §§40.601 - 40.603

The new sections are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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SUBCHAPTER H. TRANSPORTATION SERVICES FOR INDIGENT CANCER PATIENTS

25 TAC §40.701, §40.702

The repeals are adopted under Human Resources Code, Chapter 22 and Chapter 32, the Health and Safety Code, §12.001 and the Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer the state's medical assistance program and are submitted by the department under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Acts 1991, 72nd Legislature, First Called Session, Chapter 15, §1.07.

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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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 5. SYSTEM CAP TRADING

30 TAC §§101.380, 101.382, 101.383, 101.385

The Texas Natural Resource Conservation Commission (commission) adopts new §101.380, Definitions; §101.382, Applicability; §101.383, General Provisions; and §101.385, Recordkeeping and Reporting. Sections 101.383 and 101.385 are adopted *with changes* to the proposed text as published in the December 1, 2000 issue of the *Texas Register* (25 TexReg 11878). Sections 101.380 and 101.382 are adopted *without changes* and will not be republished. The new sections are grouped into Subchapter H, Emissions Banking and Trading; new Division 5, System Cap Trading. The new sections will also be submitted to the United States Environmental Protection

Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted rules will simplify emission trading for electric generating facilities (EGFs) operating under a system emission cap in the Dallas/Fort Worth (DFW) ozone nonattainment area and in the attainment counties of east and central Texas. The rules represent a continuing commitment by the commission to incorporate maximum flexibility for the electric industry in achieving the nitrogen oxides (NO_x) emissions reductions necessary to achieve the goal of ozone attainment in the DFW area while maintaining reliability of service. The DFW area includes Collin, Dallas, Denton, and Tarrant counties. The adopted procedure may be applied to other facilities subject to a system cap under Chapter 117 in subsequent rulemaking.

Emission reduction credit (ERC) trading among companies is allowed under the April 19, 2000 adoption of the DFW ozone attainment demonstration rules for EGFs, which were published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 4140). In order to complete a trade under these existing rules, one source owner must bank an emission credit with the commission and another source owner must receive the executive director's approval to use the credit. This procedure works well for trades which are made relatively infrequently, such as tend to occur when emissions are limited annually. In contrast, the ozone attainment demonstration rules for EGFs in DFW establish daily NO_x limits because the EGFs in DFW are more likely to emit the most NO_x on days conducive to exceedences of the ozone standard. This adoption adds a trading alternative which will facilitate daily emission trading by reducing the steps necessary to trade allowable emissions among different owners. Under these rules, the source owners will be simply required to report trades and the commission will have the opportunity to review, on a quarterly basis, the daily emissions, 30-day rolling average emissions, and any emission trades which occurred during the preceding calendar quarter.

Individual sources under common ownership or control may be voluntarily grouped together in a system with a system cap on total emissions from the sources in the system. Emission allowables may be transferred from source to source within the system, provided the cap is not exceeded. This adoption allows the increase of system caps, provided that surplus emission allowables are obtained from another source owner participating in a system cap. The system cap may be increased daily using a daily surplus or on a 30-day rolling average using 30-day rolling average surpluses for the same period.

The rules adopted on April 19, 2000 also established an annual system cap for EGFs in the attainment counties of east and central Texas (25 TexReg 4101). This adoption allows the exceedence of that system cap, provided surplus emission allowables are obtained from another EGF participating in the system cap. The EGFs affected are in the following counties: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

The transfer of emission allowables remains restricted to the area, nonattainment or attainment, in which it originates.

SECTION BY SECTION DISCUSSION

The new §101.380 contains definitions for use in this division. Surplus emission allowables are defined as an amount, greater than zero, by which a source's allowable source cap emissions exceed actual emissions for a single day or a 30-day average or tons per year for a calendar year for a source subject to Chapter 117, Subchapter B, Division 2, Utility Electric Generation in East and Central Texas.

The new §101.382 applies the trading provisions of this division to sources located within a single nonattainment area or other area with unique emission limits as defined in Chapter 117.

The new §101.383 allows the increase of system cap limits provided surplus allowances are obtained from another owner or operator participating in the system cap. Emissions caps may be increased daily or on a 30-day rolling average, provided allowances are obtained that match the period when the increase occurs. System cap limits for EGFs as regulated under Chapter 117, Subchapter B, Division 2, may be exceeded with surplus emission allowables obtained for that calendar year from another source owner or operator participating in the system cap. In response to comments, the commission has modified §101.383(b) to use the term "units within an electric power generating system" and to more specifically reference the computation of system cap limits in §117.138. The commission has modified §101.383(c) to correctly reference subsections (a) and (b) of this section.

The new §101.385 requires owners or operators of sources in an ozone nonattainment area participating in this trading program to submit quarterly reports based on a calendar year within 30 days of the end of the reporting period. The reports will contain daily NO_x emissions from each source and supporting calculations, rolling 30-day average for each source with supporting calculations, and all emission trades during the reporting period including trade date or period, quantity traded, and trading participants. Similarly, EGFs complying with Chapter 117, Subchapter B, Division 2, will submit reports dated on annual period beginning January 1 of each year and submitted within 30 days following the end of the annual period. The report will detail annual emissions with supporting calculations and all emission trades during the report period including trade date, quantity traded, and trade participants. This section also requires owners or operators to report to the commission, within 48 hours, any exceedences of a system cap when there were not allowances available to compensate for that exceedence. In response to comments, the commission has modified §101.385(b) to more specifically reference the computation of system cap limits in §117.138. Also in response to comments, the commission has added the clarifying phrase "conducted under this division" to §101.385(b)(3)(B) and has additionally added this clarification to §101.385(a)(3)(B). The commission has also modified §101.385(c) in response to comments. The phrase "with data to demonstrate the amount of emissions in excess of the applicable limit" has been deleted from §101.385(c)(1) and replaced with the phrase "with supporting data" and the deleted phrase has been more appropriately located in §101.385(c)(3).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that these new sections do not meet the definition of a "major environmental rule" as defined in Texas Government Code, 2001.0225."Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material

way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission is adopting these new sections to allow greater flexibility for sources in the affected areas to meet NO_x emission limitations and for NO_x emissions trading. The new sections do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state; therefore, this proposal does not constitute a major environmental rule. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rules do not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements were developed in order to meet the ozone national ambient air quality standard (NAAQS) set by the EPA under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409), and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required; and these rules provide additional flexibility to meet emission limits. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The commission bases these actions on the presumption that the legislature understands this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Because it is a rule of statutory interpretation that the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to allow greater flexibility for EGFs in the affected areas to meet NO_x emission limitations and for NO_x emissions trading in order to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017 as well as under 42 USC, §7410(a)(2)(A).

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. The new sections are adopted as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the DFW nonattainment area to attain the NAAQS for ozone and to maintain air quality in the east and central Texas area. Promulgation and enforcement of the rules will not burden private real property. The new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the NO_x emissions under the system cap that are the subject of these rules are not property rights. Consequently, the sections do not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the new sections do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially

fulfill a federal mandate under the USC, §7410. Specifically, the emission limitations and control requirements that are the subject of this rulemaking were developed in order to meet the ozone NAAQS set by the EPA under the USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rules is to implement a NO_x strategy which is necessary for the DFW area to meet the air quality standards established under federal law and to maintain air quality in east and central Texas. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these revisions do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking relates to an action or actions subject to the Texas Coastal Management Plan (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined the rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires the commission protect air quality in coastal areas. The new sections allow greater flexibility in meeting system cap requirements by trading NO_x emissions among sources in the DFW and east and central Texas areas. These rules do not authorize any new NO_x air emissions.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new sections are part of the state's ozone attainment strategy; therefore, these revisions are to be submitted as part of the SIP. As a result, the new sections are applicable requirements under the federal operating permit program and sources are required to revise their permits if they choose to participate in the system cap.

HEARINGS AND COMMENTERS

The commission held public hearings on the proposal in Irving on January 3, 2001 and in Austin on January 4, 2001. Eight commenters submitted comments during the public comment period which closed on January 5, 2001.

American Electric Power (AEP), the Association of Electric Companies of Texas, Inc. as submitted by Jenkins and Gilchrist (AECT), and TXU Business Services (TXU), generally supported the proposal but suggested changes for clarity. Entergy Services, Inc. (Entergy) and Reliant Energy, Inc. (Reliant) supported the concept of the proposal but advocated its expansion to other regions of the state. The City of Garland and the City of Denton as submitted by the Law Office of Erich Birch, P.C. (the Cities) supported the concept of the proposal but suggested specific changes. The North Central Texas Council of Governments supported the proposal. Environmental Defense opposed specific parts of the proposal.

ANALYSIS OF TESTIMONY

AECT, AEP, and TXU supported the proposal but commented on an apparent omission from §101.383(c) where subsection (b) was not cited as an exception to Chapter 117 cap requirements. Subsection (b) contains the new requirement for trading in east and central Texas.

The commission has revised the rule in response to this comment. The citation in §101.383(c) has been corrected.

AECT and AEP commented that §101.382 should be modified to clarify the term "within another single area with unique emission limits...." They suggested stating specifically that trading of surplus emission allowables would be limited to sources located within a single nonattainment area or within another single area with unique emission limits "such as the east and central Texas area comprising those counties listed in §117.131(4)."

The commission has not changed the rule based on this comment. Chapter 117 contains specific emission limits for NO_x based on attainment status of a defined geographic area and other factors. Because emission credits or allowances are based on meeting the standards in Chapter 117, the commission believes it is appropriate to retain the language that restricts trading based on the Chapter 117 language that specifies to what geographic area those standards apply.

AECT and AEP commented that §101.383(b) be modified to remove the term "utility electric generating units" which is not defined in Chapter 101. They also commented that the proposed subsection refers to "Chapter 117, Subchapter B, Division 2" which is a broader reference than is necessary and suggested narrowing the reference to §117.138, System Cap. They repeated this comment concerning a similar reference to Chapter 117, Subchapter B, Division 2 in §101.385(b). AECT also commented that the annual reporting requirement that is the subject of §101.385(b) should also be referenced in §117.149.

The commission has modified §101.383(b) to use the term "units within an electric power generating system." This term is consistent with that used in §117.138. The commission has also modified §101.383(b) and §101.385(b) to more specifically reference the computation of system cap limits in §117.138. The commission did not propose amendments to §117.149 in this rulemaking and therefore cannot amend the section at this adoption. The commission may examine the need to include the reporting requirement of §101.385(b) in §117.149 for future rulemaking.

AECT and AEP commented that the 30-day schedule for submission of an annual activity report as required by §101.385(b)(2) is too short and should be expanded to 60 days. They stated that the 60-day schedule would be consistent with the schedule required for grandfathered electric generating facilities under §101.336(b).

The commission has not changed the rule based on this comment. The annual activity report will be a compilation of existing records on trades that have occurred during a calendar year, and the commission believes 30 days is adequate time to accomplish this.

AECT and AEP commented that §101.385(b)(3)(B) be modified to state that the applicability to emission trades referenced in the

subparagraph is limited to the trades conducted under Chapter 101, Subchapter H, Division 5.

The commission agrees with the commenter that the suggested change clarifies intent and has made the appropriate change to §101.385(b)(3)(B) and additionally to §101.385(a)(3)(B).

AECT and AEP commented that the phrase "with data to demonstrate the amount of emissions in excess of the applicable limit" be deleted from §101.385(c)(1) and be replaced with the phrase "with supporting data." The deleted phrase should be relocated to §101.385(c)(3) since the subject of that paragraph is exceedences of limits.

The commission agrees that the suggested reorganization clarifies the rule and has had made the recommended deletion and relocation.

Entergy and Reliant commented that in the May 2000 rulemaking which established daily NO_x emission limits for utility boilers in the DFW area, similar limits were established for utility boilers in the Beaumont/Port Arthur (BPA) nonattainment area. They stated that the requirement for flexibility in meeting NO_x limits is as great in BPA as it is in DFW and that the flexibility that is proposed for DFW be extended to BPA as well. They stated that in the preamble for the System Cap Trading rules (25 TexReg 11878) the commission stated that the proposed procedure may be applied to other facilities subject to a system cap under Chapter 117 in subsequent rulemaking. Reliant also commented that the trading flexibility should apply in the Houston/Galveston (HGA) nonattainment area.

The commission has not changed the rule in response to this comment. The commission desires to extend maximum flexibility to any group of electric generating facilities subject to emission limits or system caps. However, these amendments were proposed for the DFW area and certain other counties of east and central Texas, and there was no opportunity for full public comment from the BPA or HGA areas. Trading flexibility is an issue closely related to the SIPs for the BPA and HGA areas, and the commission believes there should be an opportunity for comment in a separate rulemaking before this flexibility is further extended. The commission may consider extending this flexibility in future rulemaking.

Environmental Defense supported trading between owners or operators of two system caps and stated that this would not jeopardize the overall regional cap. They expressed concern over the proposed §117.109 and §117.139 which allow the use of ERCs and discrete emission reduction credits (DERCs). Environmental Defense stated that the use of these credits creates the possibility that reduction credits generated from a control strategy no longer in place can be used to meet system cap requirements (in the case of DERCs) and would lead to exceedences of the cap. They urged the commission to limit the trading flexibility in §117.109 and §117.139 to compliance with the requirements of Chapter 101, Subchapter H, Division 5.

The commission has not changed the rule in response to this comment. The commission has previously examined the use of ERCs and DERCs and their effect on system caps and adopted §117.570 to extend the flexibility of using these credits within a system cap. The commission has analyzed the use of DERCs within the DFW system caps. A DERC represents one ton of emission credit and may only be used once. Because of the limited amount of DERCs available for use in the DFW area, the commission believes their use under the system caps will not significantly affect the SIP. Sections 117.109 and 117.139 clarify an existing flexibility that was created with the adoption of §117.570 in December 2000.

The Cities commented that they and TXU are the only operators of electric generating facilities in the DFW area with the Cities supplying about 10% of the power and TXU supplying the other 90%. The trading program would therefore be limited to these three participants. The Cities do not anticipate having any surplus allowables that would be of significance to TXU and the only source of allowables to the Cities would be TXU. The Cities do not imply any bad motive to TXU, but stated that they are concerned that TXU's near monopoly will allow them to control the price of allowables. The Cities suggested that, until such time as other electric generating operators move into the DFW area, the commission tie the price of allowables to some independent standard such as the average cost of installation of electric generator emission controls in DFW. Another option would be to establish a ceiling on prices based on the price of credits in markets similar to DFW.

The commission has not changed the rules in response to this comment. The trading of allowables is an alternative to meeting emission limitations, and the commission would expect that, under the flexibility of trading programs, an owner of an electric generating unit would choose the least expensive option of either obtaining additional allowables or lowering emissions. The commission acknowledges the relative size of the generating capacity of the eligible participants in the DFW program but disagrees that the Cities would not have excess allowables that would be of significance to TXU. The price of allowables will be determined by several factors including the need of a supplier to increase generation and the amount of allowables available. Even a small amount of excess allowables available from a relatively small generator could be important when maximum generation is required from a larger generator. The commission will continually monitor the operation of the program and will address problems if and when they emerge.

The Cities commented that the estimated price of reduction credits of $3,600 per ton, as based on prices in HGA, is significantly underestimated. The market will tighten as SIP deadlines approach resulting in a price for credits that can be from ten to 100 times as much. They stated that the program as proposed allows the option of control installation or participating in the trading program. As the market tightens those operators that chose to forego the installation of controls could find the cost of credits prohibitively expensive.

The commission has not changed the rules in response to this comment. The estimate of the price of reduction credits was based on the best data available to the commission. The commission understands that the conditions affecting the cost of credits will change and has purposely established this program to allow individual operators to analyze their operation and its relation to other operations and make their best business judgement. The commission expects that the market for credits will tighten based on the relative stringency of the DFW emission standards. Owners of electric generating facilities should consider this possibility when making the decision whether to install additional emission controls or to purchase credits for compliance.

The Cities commented that the trading option should be extended to other NO_x sources, stationary and mobile, as an incentive to reductions and as a method of reducing the potential of a monopolistic market.

The commission has not changed the rules in response to this comment. This rule was proposed as applicable to electric generating facilities in the DFW area and certain counties in east and central Texas. Trading flexibility is an issue closely related to the SIP, and the commission believes there should be an opportunity for public comment before this flexibility is further extended. The commission may examine extending this flexibility for future rulemaking.

STATUTORY AUTHORITY

The new sections are adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

§101.383. General Provisions.

(a) System cap limits may be exceeded with surplus emission allowables obtained for that day from another source owner or operator participating in a system cap. The owner or operator may exceed the:

(1) maximum daily cap with a one-day surplus emission allowables generated on the same day; and

(2) rolling 30-day average daily system cap emission limitation with a surplus emission allowables generated over the same period.

(b) System cap limits for units within an electric power generating system as regulated under §117.138 of this title (relating to System Cap) may be exceeded with surplus emission allowables obtained for that calendar year from another source owner or operator participating in a system cap.

(c) The cap requirements of Chapter 117 of this title (relating to Control of Air Pollution from Nitrogen Compounds) continue to apply, except as modified in subsections (a) and (b) of this section.

§101.385. Recordkeeping and Reporting.

(a) The owner or operator of a source in an ozone nonattainment area participating with this division shall submit to the executive director a quarterly report.

(1) Each quarterly report will be based on a three-calendar month period beginning on January 1 of each year.

(2) The report shall be submitted within 30 days following the end of the quarterly period.

(3) The report shall detail the following:

(A) the daily nitrogen oxides (NO_x) emissions from each source along with supporting calculations for the maximum daily cap and the rolling 30-day average system cap emission limitation;

(B) all emission trades conducted under this division during the reported time period including the trade date or period, quantity traded, and trading participants.

(b) The owner or operator of a source participating in a system cap limit for sources subject to §117.138 of this title (relating to System Cap) shall submit to the executive director an annual report.

(1) Each annual report will be based on a 12-month calendar period beginning on January 1 of each year.

(2) The report shall be submitted within 30 days following the end of the annual period.

(3) The report shall detail the following:

(A) the annual NO_x emissions from each source along with supporting calculations; and

(B) all emissions trades conducted under this division during the reported time period including trade date, quantity traded, and trade participants.

(c) The owner or operator of any system participating in this division shall report within 48 hours to the executive director any time that the system exceeded its daily or rolling 30-day average system cap emission limitation, or within 30 days any time that the system exceeded its annual system cap, and did not obtain surplus emission allowables for that time period. This report shall include:

(1) cause of the exceedence with supporting data;

(2) date or period of exceedence;

(3) amount of exceedence with data to demonstrate the amount of emissions in excess of the applicable limit; and

(4) number of surplus emission allowables traded on the date of or during the period of the exceedence.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

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Margaret Hoffman
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Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-0348

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CHAPTER 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS SUBCHAPTER B. COMBUSTION AT MAJOR SOURCES

The Texas Natural Resource Conservation Commission (commission) adopts new §117.109, System Cap Flexibility; §117.110, Change of Ownership - System Cap; and §117.139, System Cap Flexibility. Section 117.139 is adopted *with changes* to the proposed text as published in the December 1, 2000 issue of the *Texas Register* (25 TexReg 11883). Sections 117.109 and 117.110 are adopted *without changes* and will not be republished. The new sections will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

On April 19, 2000 the commission adopted rules, which were published in the May 5, 2000 issue of the *Texas Register* (25

TexReg 4101 and TexReg 4140), that required electric generating facilities (EGFs) in the Dallas/Fort Worth (DFW) ozone nonattainment area and east and central Texas to meet specific nitrogen oxides (NO_x) emission limits. The counties of Collin, Dallas, Denton, and Tarrant are included in the DFW area. The counties affected in the attainment area are: Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, and Wharton.

Under the adopted rules, owners or operators of EGFs are given the option of participating in a system cap to meet the emission requirements in Chapter 117. Under a system cap owners or operators of EGFs will have the option of averaging emissions among facilities as long as the facilities are under common ownership or control and an overall cap on the system is not exceeded. The purpose of this adoption is to give the owners and operators of EGFs in the affected areas additional flexibility in meeting their system caps either through the use of emission reduction credits (ERCs), discrete emission reduction credits (DERCs), or through the transfer of emission allowables among EGFs participating in a system cap that are in the same nonattainment or attainment area.

SECTION BY SECTION DISCUSSION

The new §117.109 allows owners or operators of NO_x sources in the DFW ozone nonattainment area who are participating in a system cap under §117.108, System Cap, to trade emissions with other participating owners or operators of NO_x sources in the DFW ozone nonattainment area under the requirements in amendments to Chapter 101, Subchapter H, Division 1, 4, or 5, relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading. The new Chapter 101, Subchapter H, Division 5 is being adopted in a concurrent rulemaking in this issue of the *Texas Register*.

The new §117.110 states that in the event that a unit of electric power generation is sold or transferred, the unit shall become subject to the transferee's emission cap. The value Ri in §117.108(c), System Cap is based on a unit's status as of January 1, 2000 and does not change as a result of the sale or transfer of a unit regardless of the size of the transferee's system.

The new §117.139 states that an owner or operator of a source of NO_x in an east or central Texas attainment area who is participating in the system cap under §117.138, System Cap may exceed his or her system cap provided the owner or operator is complying with Chapter 101, Subchapter H, Division 1, 4, or 5. In response to comment, the commission has changed the phrase "east and central Texas area" to "any of the east and central Texas attainment counties listed in §117.131(4) of this title (relating to Applicability)."

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that these new sections do not meet the definition of a "major environmental rule" as defined in Texas Government Code, 2001.0225. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission is adopting these new sections to allow greater flexibility for EGFs in the affected areas to meet NO_x emission limitations and for NO_x emissions trading. The new sections do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state; therefore, these proposed sections does not constitute a major environmental rule. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the rules do not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements were developed in order to meet the ozone national ambient air quality standard (NAAQS) set by the EPA under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409), and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required; and these rules provide additional flexibility to meet emission limits. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the

commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The commission bases these actions on the presumption that the legislature understands this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Because it is a rule of statutory interpretation that the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to allow greater flexibility for EGFs in the affected areas to meet NO_x emission limitations and for NO_x emissions trading in order to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. The new sections are adopted as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the DFW nonattainment area to attain the NAAQS for ozone and to maintain air quality in east and central Texas. Promulgation and enforcement of the rules will not burden private real property. The new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the NO_x emissions under the system cap that are the subject of these rules are not property rights. Consequently, the new sections do not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the new sections do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the USC, §7410. Specifically, the emission limitations and control requirements within this rulemaking were developed in order to meet the ozone NAAQS set by the EPA under the USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rules is to implement a NO_x strategy which is necessary for the DFW area to meet the air quality standards established under federal law and to maintain air quality in east and central Texas. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these adopted revisions do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking relates to an action or actions subject to the Texas Coastal Management Plan (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined the rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires the commission protect air quality in coastal areas. The new sections allow greater flexibility in meeting system cap requirements by trading NO_x emissions among EGFs in the affected areas. The new sections do not authorize any new NO_x air emissions.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new sections are part of the state's ozone attainment strategy; therefore, these revisions are to be submitted as part of the SIP. As a result, the new sections are applicable requirements under the federal operating permit program and sources are required to revise their permits if they choose to participate in the system cap.

HEARINGS AND COMMENTERS

The commission held public hearings on the proposal in Irving on January 3, 2001 and in Austin on January 4, 2001. Eight commenters submitted comments during the public comment period which closed on January 5, 2001.

American Electric Power (AEP), the Association of Electric Companies of Texas, Inc. as submitted by Jenkins and Gilchrist (AECT), and TXU Business Services (TXU), generally supported the proposal but suggested changes for clarity. Entergy Services, Inc. (Entergy) and Reliant Energy, Inc. (Reliant) supported the concept of the proposal but advocated its expansion to other regions of the state. The City of Garland and the City of Denton as submitted by the Law Office of Erich Birch, P.C.

(the Cities) supported the concept of the proposal but suggested specific changes. The North Central Texas Council of Governments supported the proposal. Environmental Defense opposed specific parts of the proposal.

ANALYSIS OF TESTIMONY

AECT and AEP commented that §117.139 should be clarified to state that it is not owners or operators that may exceed a NO_x cap but sources with the same owner or operator. They also commented that, since the term "east and central Texas area" is not defined in Chapter 117, the applicability of §117.139 be referenced as "any of the east and central Texas attainment counties listed in §117.131(4) of this title (relating to Applicability)."

The commission has not changed the rule in response to the comment on system caps. A system cap is determined by a group of sources under common ownership or control located within the same area that has unique NO_x emission limits, and management of the system cap is the responsibility of the owner or operator. In order for that system cap to be exceeded, the owner or operator of the cap must obtain surplus emission allowables from another owner or operator also participating in a system cap. The commission has made the recommended change concerning the designation of the "east and central Texas area" because the suggested Chapter 117 citation contains a listing of specific counties.

Entergy and Reliant commented that in the May 2000 rulemaking which established daily NO_x emission limits for utility boilers in the DFW area, similar limits were established for utility boilers in the Beaumont/Port Arthur (BPA) nonattainment area. They stated that the requirement for flexibility in meeting NO_x limits is as great in BPA as it is in DFW and that the flexibility that is proposed for DFW be extended to BPA as well. They stated that in the preamble for the System Cap Trading rules (25 TexReg 11878) the commission stated that the proposed procedure may be applied to other facilities subject to a system cap under Chapter 117 in subsequent rulemaking. Reliant also commented that the trading flexibility should apply in the Houston/Galveston (HGA) nonattainment area.

The commission has not changed the rule in response to this comment. The commission desires to extend maximum flexibility to any group of electric generating facilities subject to emission limits or system caps. However, these amendments were proposed for the DFW area and certain other counties of east and central Texas, and there was no opportunity for full public comment from the BPA or HGA areas. Trading flexibility is an issue closely related to the SIPs for the BPA and HGA areas, and the commission believes there should be an opportunity for comment in a separate rulemaking before this flexibility is further extended. The commission may consider extending this flexibility in future rulemaking.

Environmental Defense supported trading between owners or operators of two system caps and stated that this would not jeopardize the overall regional cap. They expressed concern over the proposed §117.109 and §117.139 which allow the use of ERCs and DERCs. Environmental Defense expressed that the use of these credits creates the possibility that reduction credits generated from a control strategy no longer in place can be used to meet system cap requirements (in the case of DERCs) and would lead to exceedences of the cap. They urged the commission to limit the trading flexibility in §117.109 and §117.139 to compliance with the requirements of Chapter 101, Subchapter H, Division 5.

The commission has not changed the rule in response to this comment. The commission has previously examined the use of ERCs and DERCs and their effect on system caps and adopted §117.570 to extend the flexibility of using these credits within a system cap. The commission has analyzed the use of DERCs within the DFW system caps. A DERC represents one ton of emission credit and may only be used once. Because of the limited amount of DERCs available for use in the DFW area, the commission believes their use under the system caps will not significantly affect the SIP. Sections 117.109 and 117.139 clarify an existing flexibility that was created with the adoption of §117.570 in December 2000.

The Cities commented that they and TXU are the only operators of electric generating facilities in the DFW area with the Cities supplying about 10% of the power and TXU supplying the other 90%. The trading program would therefore be limited to these three participants. The Cities do not anticipate having any surplus allowables that would be of significance to TXU and the only source of allowables to the Cities would be TXU. The Cities do not imply any bad motive to TXU, but stated that they are concerned that TXU's near monopoly will allow them to control the price of allowables. The Cities suggested that, until such time as other electric generating operators move into the DFW area, the commission tie the price of allowables to some independent standard such as the average cost of installation of electric generator emission controls in DFW. Another option would be to establish a ceiling on prices based on the price of credits in markets similar to DFW.

The commission has not changed the rules in response to this comment. The trading of allowables is an alternative to meeting emission limitations, and the commission would expect that, under the flexibility of trading programs, an owner of an electric generating unit would choose the least expensive option of either obtaining additional allowables or lowering emissions. The commission acknowledges the relative size of the generating capacity of the eligible participants in the DFW program but disagrees that the Cities would not have excess allowables that would be of significance to TXU. The price of allowables will be determined by several factors including the need of a supplier to increase generation and the amount of allowables available. Even a small amount of excess allowables available from a relatively small generator could be important when maximum generation is required from a larger generator. The commission will continually monitor the operation of the program and will address problems if and when they emerge.

The Cities commented that the estimated price of reduction credits of $3,600 per ton, as based on prices in HGA, is significantly underestimated. The market will tighten as SIP deadlines approach resulting in a price for credits that can be from ten to 100 times as much. They stated that the program as proposed allows the option of control installation or participating in the trading program. As the market tightens those operators that chose to forego the installation of controls could find the cost of credits prohibitively expensive.

The commission has not changed the rules in response to this comment. The estimate of the price of reduction credits was based on the best data available to the commission. The commission understands that the conditions affecting the cost of credits will change and has purposely established this program to allow individual operators to analyze their operation and its relation to other operations and make their best business judgement. The commission expects that the market for credits

will tighten based on the relative stringency of the DFW emission standards. Owners of electric generating facilities should consider this possibility when making the decision whether to install additional emission controls or to purchase credits for compliance.

The Cities commented that the trading option should be extended to other NO_x sources, stationary and mobile, as an incentive to reductions and as a method of reducing the potential of a monopolistic market.

The commission has not changed the rules in response to this comment. This rule was proposed as applicable to electric generating facilities in the DFW area and certain counties in east and central Texas. Trading flexibility is an issue closely related to the SIP, and the commission believes there should be an opportunity for public comment before this flexibility is further extended. The commission may examine extending this flexibility for future rulemaking.

DIVISION 1. UTILITY ELECTRIC GENERATION IN OZONE NONATTAINMENT AREAS

30 TAC §117.109, §117.110

STATUTORY AUTHORITY

The new sections are adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

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DIVISION 2. UTILITY ELECTRIC GENERATION IN EAST AND CENTRAL TEXAS

30 TAC §117.139

STATUTORY AUTHORITY

The new section is adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and 42 USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

§117.139. System Cap Flexibility.

An owner or operator of a source of nitrogen oxides (NO_x) in any of the east and central Texas attainment counties listed in §117.131(4) of this title (relating to Applicability) who is participating in the system cap under §117.138 of this title (relating to System Cap) may exceed their system cap provided that the owner or operator is complying with the requirements of Chapter 101, Subchapter H, Division 1, 4, or 5 of this title (relating to Emission Credit Banking and Trading; Discrete Emission Credit and Trading Program; and System Cap Trading).

This agency hereby certifies that the 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 305. CONSOLIDATED PERMITS SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.69

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §305.69, Solid Waste Permit Modification at the Request of the Permittee. Amended §305.69 is adopted *without changes* to the proposed text as published in the December 8, 2000 issue of the *Texas Register* (25 TexReg 12134) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The primary purpose of this adoption is to revise commission rules to conform to the federal military munitions regulation promulgated by the United States Environmental Protection Agency (EPA) on February 12, 1997 at 62 FedReg 6622. The adopted rule provides that a permittee is authorized to continue to accept waste military munitions notwithstanding any permit conditions barring the permittee from accepting off-site wastes, if the facility and permittee meet certain conditions as described in the Section by Section Discussion portion of this preamble. In addition to this amendment to Chapter 305, requirements concerning military munitions waste are concurrently being adopted as amendments to Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, which define when military munitions become solid wastes. As a result, some military installations receiving materials that were not previously wastes may become

regulated. In these cases, if the installation's hazardous waste permit has conditions prohibiting the receipt of "off-site" wastes, and the newly regulated wastes are being received from off-site, the installation would be in violation of its hazardous waste permit, unless and until the permit is modified to authorize the receipt of off-site waste munitions. To address these potential unintended violations, the amendment sets in place a rule to allow the permittee to continue to accept the waste military munitions notwithstanding any permit conditions barring the permittee from accepting off-site wastes, if the facility and permittee meet certain conditions. If no such off-site waste prohibition exists in the permit, other necessary modifications would be done under the procedures of existing §305.69(h), which addresses newly regulated wastes and units.

SECTION BY SECTION DISCUSSION

The adopted amendment under §305.69(j) allows a permittee to continue to accept from off- site military munitions that have become a hazardous waste notwithstanding any permit conditions barring the permittee from accepting off-site wastes, if the facility and permittee meet certain conditions. These conditions are adopted under §305.69(j)(1) - (3) and are as follows: 1) the facility must be in existence as a hazardous waste management facility, and the facility be permitted to handle waste military munitions on the date when waste military munitions become subject to hazardous waste regulatory requirements; 2) the permittee must submit, on or before the date when waste military munitions become subject to hazardous waste regulatory requirements, a Class 1 modification request to remove or revise the permit provision restricting the receipt of off-site waste munitions; and 3) the permittee must submit a Class 2 modification request within 180 days of the date when waste military munitions become subject to hazardous waste regulatory requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has determined that the rulemaking is not subject to the regulatory analysis requirements of Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The adopted rule will not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted amendment provides the ability to make required changes to permits to allow federal military hazardous waste facilities to receive and process off-site military munitions waste classified as hazardous solid waste. The amendment does not meet the definition of a "major environmental rule" as defined in the Texas Government Code, since §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required in this instance because the adopted rule does not trigger any of the four criteria in §2001.0225.

The adopted rule does not exceed a standard set by federal law.

The requirements of this rule are being implemented to maintain equivalency with federal law (federal military munitions rule, 62 FedReg 6622 *et seq.*) and do not exceed any federal standards.

The adopted rule does not exceed an express requirement of state law.

The requirements of this rule seek to carry out the commission's statutory responsibility under Texas Health and Safety Code (THSC), §361.017 (relating to The Commission's Jurisdiction Over Industrial Solid and Hazardous Municipal Waste) and §361.024 (relating to Rules and Standards). The rule seeks to comply with the relevant specific state law and not to exceed it.

The adopted rule does not exceed a delegation agreement or contract between the state and the federal government.

The commission is not a party to a delegation agreement with the federal government concerning a state or federal program that would be applicable to requirements set forth in the rule. Accordingly, there are no delegation agreement requirements that could be exceeded by this rule.

The rule is not adopted solely under the general powers of the agency.

The commission is adopting this rule under the general powers of the agency, Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), as well as under certain specific statutory authority of the agency, THSC, §361.017 and §361.024. Accordingly, this rule is not being adopted solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for the adopted rule pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the adopted rule is to ensure that Texas' state hazardous waste rules on military munitions waste are equivalent to the federal regulations after which they are patterned. The adopted rule will substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to this rulemaking because this is an action that is reasonably taken to fulfill an obligation mandated by federal law.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed this rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program (CMP), or will affect an action and/or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6), and therefore requires that applicable goals and policies of the CMP be considered during the rulemaking process. The commission has prepared a consistency determination for this adoption pursuant to 31 TAC §505.22 and has found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities

and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. Promulgation and enforcement of this rule is consistent with the applicable CMP goals and policies because the rule amendment updates and enhances the commission's rules concerning permit modifications for certain hazardous and industrial solid waste facilities. In addition, the rule does not violate any applicable provisions of the CMP's stated goals and policies.

HEARINGS AND COMMENTERS

The commission did not hold a public hearing on the adopted amendment. The comment period for the proposed rules closed at 5:00 p.m., January 8, 2001. There were no comments received.

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Proposal publication date: December 8, 2000
For further information, please call: (512) 239-4712

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CHAPTER 335. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §335.1, Definitions; §335.41, Purpose, Scope and Applicability; §335.61, Purpose, Scope and Applicability; §335.91, Scope; §335.111, Purpose, Scope, and Applicability; §335.112, Standards; and §335.152, Standards; and new §335.271, Purpose, Scope, and Applicability; and §335.272, Standards. The amendments and new sections are adopted *without changes* to the proposed text as published in the December 8, 2000 issue of the *Texas Register* (25 TexReg 12134) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary reason for the adopted amendments is to adopt the military munitions rule promulgated by the United States Environmental Protection Agency (EPA) in the February 12, 1997 issue of the *Federal Register*, at 62 FedReg 6622. The adoption includes conforming changes to the commission's rules that are needed to establish equivalency with the federal regulations, which will enable the State of Texas to increase its level of authorization to operate aspects of the federal hazardous waste program in lieu of the EPA. The adopted rules also make needed administrative revisions, improvements to readability, and correction of internal cross-references.

The adopted definition of "military munition" and the adopted rules which determine whether a military munition is a solid waste are the substance of this adoption. These adopted amendments conform the commission's rules to the federal military munitions regulation, and identify when conventional and chemical military munitions become a solid waste subject to hazardous waste determination, and provide for the safe storage and transport of this waste. The adoption also provides rules for emergency responses involving both military and non-military munitions and explosives; and treatment, storage, disposal, and transportation standards for waste military munitions.

SECTION BY SECTION DISCUSSION

This adoption adds three new definitions to §335.1 to clarify the adopted exemption from hazardous waste permitting for immediate responses to threats involving munitions or other explosives: "explosives or munitions emergency," "explosives or munitions emergency response," and "explosives or munitions emergency response specialist." Also adopted are new definitions for "military munitions."

Adopted §335.41 adds an exemption for certain persons engaged in processing or containment activities during the response to an immediate threat to human health, public safety, property, or the environment, from the known or suspected presence of military munitions, other explosive material, or an explosive device. This exemption removes regulatory impediments to the safe and prompt management of explosives or munitions emergencies.

Adopted §335.61(h) adds an exemption for federal, state and local officials and authorized munitions emergency response specialists, answering to an explosives or munitions emergency, to remove regulatory impediments to the safe and prompt management of explosives or munitions emergencies.

Adopted new §335.91(f) adds an exemption for transporters who are responding during an explosives or munitions emergency, to allow prompt response to explosives emergencies when necessary.

Adopted §335.91(g) incorporates the non-emergency transportation directives provided in 40 Code of Federal Regulations (CFR) §266.203, which is adopted by reference in new Chapter 335, Subchapter H, Division 6 (relating to Military Munitions). A conditional exemption from Resource Conservation and Recovery Act (RCRA) regulation for waste non-chemical military munitions in transportation is provided within 40 CFR §266.203.

Adopted §335.112, Standards, is amended under §335.112(a)(4) to update the adoption by reference of 40 CFR Part 265, Subpart E - Manifest System, Recordkeeping, and Reporting. The adopted amendment incorporates the exemption from manifest requirements for owners and operators of off-site facilities with respect to waste military munitions that are conditionally exempt by 40 CFR §266.203(a) from the transporter standards in Chapter 335, Subchapter D.

Adopted §335.112(a)(22) incorporates by reference 40 CFR Part 265, Subpart EE- Hazardous Waste Munitions and Explosives Storage requirements which provide design, operating, closure,

and post-closure care interim status standards for owners and operators who store non-military or military waste munitions in storage units.

Section 335.152, Standards, is adopted to update §335.152(a)(4), which is the incorporation of 40 CFR Part 264, Subpart E - Manifest System, Recordkeeping, and Reporting, with exceptions. The update incorporates the exemption from manifest requirements for owners and operators of off-site facilities with respect to waste military munitions that are conditionally exempt by 40 CFR §266.203(a), adopted by reference under Subchapter H, Division 6, from the transporter standards in Chapter 335, Subchapter D.

Adopted §335.152(a)(20) incorporates by reference 40 CFR Part 264, Subpart EE requirements, which provide design, operating, closure, and post-closure care permitting standards for owners and operators who store non-military or military waste munitions in storage units which were previously unregulated.

New Chapter 335, Subchapter H, Division 6, adopts by reference the requirements for waste military munitions provided in 40 CFR Part 266. The adopted division incorporates by reference 40 CFR §266.202, Definition of Solid Waste, which determines when a military munition is a solid waste. Also incorporated by reference are transportation, treatment, storage, and disposal standards for solid waste military munitions. The transportation and storage standards exempt non-chemical munitions from hazardous waste transporter and storage requirements as long as they are subject to the United States Department of Defense (DOD) shipping controls and to the jurisdiction of the DOD Explosives Safety Board for storage requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adoption in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. The adopted rule will not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adoption provides the ability to make required changes to permits to allow facilities to store hazardous munitions waste in additional types of units. The rulemaking does not meet the definition of a "major environmental rule" as defined in the Texas Government Code, since §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required in this instance because the rules do not trigger any of the four criteria in §2001.0225.

The adopted rules do not exceed a standard set by federal law.

The requirements of these rules are being implemented to maintain equivalency with federal law (federal military munitions rule, 62 FedReg 6622 *et seq*.) and do not exceed any federal standards.

The adopted rules do not exceed an express requirement of state law.

The requirements of these rules seek to carry out the commission's statutory responsibility under Texas Health and Safety Code (THSC), §361.017 (relating to the commission's jurisdiction over industrial solid and hazardous municipal waste) and §361.024 (relating to rules and standards). The rules seek to comply with the relevant specific state law and not to exceed it.

The adopted rules do not exceed a delegation agreement or contract between the state and the federal government.

The commission is not a party to a delegation agreement with the federal government concerning a state or federal program that would be applicable to requirements set forth in the rules. Accordingly, there are no delegation agreement requirements that could be exceeded by these rules.

The rules are not adopted solely under the general powers of the agency.

The commission is adopting these rules under the general powers of the agency, Texas Water Code (TWC), §5.103 (relating to Rules) and §5.105 (relating to General Policy), as well as under certain specific statutory authority of the agency, THSC, §361.017 and §361.024. Accordingly, these rules are not being adopted solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission has performed a preliminary assessment of these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rules is to ensure that Texas' state hazardous waste rules on military munitions waste are equivalent to the federal regulations after which they are patterned. These rules will substantially advance this stated purpose by adopting federal regulations by reference or by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations.

The adoption contains two sets of requirements that are more stringent than current requirements: 1) the requirement that military installations retrieve munitions fired off-range or keep a record of the event, and 2) the requirement that military personnel responding to immediate threats involving military munitions maintain records of the response. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to the adopted rules that are more stringent than current requirements because this is an action that is reasonably taken to fulfill an obligation mandated by federal law. Under RCRA, §3009, authorized states such as Texas are required to review and, if necessary, modify their hazardous waste regulatory programs when EPA promulgates standards that are more stringent or broader in scope than existing federal standards.

The adoption contains two sets of provisions which are less stringent than existing standards: 1) the manifesting exemption for the off-site shipment of unused waste munitions from one military installation to another, and 2) the conditional exemption for waste munitions storage. Promulgation and enforcement of these less stringent rules will not affect private real property because these rules provide regulatory relief, rather than adding requirements. Thus, this portion of the subject regulations does not affect a landowners rights in private real property.

The rest of the requirements in this adoption are neither more nor less stringent than current regulatory requirements. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these requirements because this is an action that is reasonably taken to fulfill an obligation mandated by federal law. See 62 FedReg 6649.

In summary, the commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to this rulemaking because, for a certain portion of the adoption, this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4); and for the remaining portion of the adoption, promulgation and enforcement of the rules will not affect private real property which is the subject of the rules and thus does not affect a landowners rights in private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), or will affect an action and/or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6), and therefore requires that applicable goals and policies of the CMP be considered during the rulemaking process. The commission has prepared a consistency determination for the adopted rules pursuant to 31 TAC §505.22 and has found the rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the rulemaking is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). Applicable policies are construction and operation of solid waste treatment, storage, and disposal facilities, such that new solid waste facilities and areal expansions of existing solid waste facilities shall be sited, designed, constructed, and operated to prevent releases of pollutants that may adversely affect CNRAs and, at a minimum, comply with standards established under the Solid Waste Disposal Act, 42 United States Code Annotated, §§6901 et seq. Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the adopted new sections and rule amendments update and enhance the commission's rules concerning military munitions for certain hazardous and industrial solid waste facilities. In addition, the rules do not violate any applicable provisions of the CMP's stated goals and policies.

HEARING AND COMMENTERS

The commission did not hold a public hearing on the adopted changes. The comment period for the proposed rules closed at 5:00 p.m., January 8, 2001. There were no comments received.

SUBCHAPTER A. INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE IN GENERAL

30 TAC §335.1

STATUTORY AUTHORITY

The amended sections is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101695
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Proposal publication date: December 8, 2000
For further information, please call: (512) 239-4712

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SUBCHAPTER B. HAZARDOUS WASTE MANAGEMENT GENERAL PROVISIONS

30 TAC §335.41

STATUTORY AUTHORITY

The amended section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

30 TAC §335.61

STATUTORY AUTHORITY

The amended section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial

solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. STANDARDS APPLICABLE TO TRANSPORTERS OF HAZARDOUS WASTE

30 TAC §335.91

STATUTORY AUTHORITY

The amended section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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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Margaret Hoffman
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Texas Natural Resource Conservation Commission
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SUBCHAPTER E. INTERIM STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §335.111, §335.112

STATUTORY AUTHORITY

The amended sections are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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SUBCHAPTER F. PERMITTING STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE STORAGE, PROCESSING, OR DISPOSAL FACILITIES

30 TAC §335.152

STATUTORY AUTHORITY

The amended section is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC, Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4712

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SUBCHAPTER H. STANDARDS FOR THE MANAGEMENT OF SPECIFIC WASTE AND SPECIFIC TYPES OF FACILITIES DIVISION 6. MILITARY MUNITIONS

30 TAC §335.271, §335.272

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the provisions of the TWC or other laws of this state; and under THSC,

Solid Waste Disposal Act, §361.017 and §361.024, which authorize the commission to regulate industrial solid waste and municipal hazardous waste and to adopt rules consistent with the general intent and purposes of the Act.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-4712

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 353. INTRODUCTORY PROVISIONS

The Texas Water Development Board (the board) adopts new §§353.31-353.33, 353.41, and 353.71 comprising new subchapters B, C, and E to 31 TAC Chapter 353, concerning Introductory Provisions, without changes to the proposed text as published in the February 2, 2001, issue of the *Texas Register* (26 TexReg 1095) and will not be republished. New §§353.31-353.33 are adopted to comply with Texas Government Code, §656.048, regarding employee training and education. New §353.41 is adopted to comply with Texas Government Code, §2161.003, regarding the historically underutilized business program. New §353.71 is adopted to comply with Texas Government Code, §2171.1045, regarding assignment of fleet vehicles.

Texas Government Code, §656.048 requires the board to adopt rules relating to the board's ability to pay for training and education of board members and employees and the obligations of those board members and employees who receive education and training. Section 353.31 states that the board's executive administrator will develop internal policies and procedures for board members and employees to use to obtain training and education in conformance with Chapter 656 of the Texas Government Code. The duty to develop policies and procedures is delegated to the executive administrator to provide the flexibility that is needed for such processes.

Section 353.32 states that the board may spend state funds to obtain training and education for its members and employees when the training and education is related to the current or prospective duties of the member or employee and when funds are available. This is to limit the use of state funds only to purposes consistent with the board's responsibilities.

Section 353.33 states that the board may pay the salary, tuition, and other fees, travel and living expenses, training stipend, material expenses, and other necessary expenses of an instructor, student, or other participant in a training or education program. This acknowledges that eligible training and education furthers the board's purposes and responsibilities and, therefore, related expenses are eligible for payment or reimbursement.

Texas Government Code, §2161.003 requires the board to adopt the administrative rules of the General Services Commission regarding the historically underutilized businesses program. Section 353.41 states that the board adopts the current administrative rules adopted by the General Services Commission regarding the historically underutilized businesses program, which are currently found in Title 1, Part 5, Chapter 111, Subchapter B.

Texas Government Code, §2171.1045 requires the board to adopt administrative rules, consistent with the management plan adopted under Texas Government Code, §2171.104, relating to the assignment and use of the board's vehicles. The rules must require that each board vehicle, with the exception of a vehicle assigned to a field employee, be assigned to the agency motor pool and be available for checkout. The board may assign a vehicle to an individual administrative or executive employee on a regular or everyday basis only if the board makes a written documented finding that the assignment is critical to the needs and mission of the agency. Section 353.71 states that all board vehicles are assigned to the motor pool unless the executive administrator makes a written finding that assigning a vehicle to a particular employee is critical to the needs and mission of the board.

There were no comments received on the proposed new sections.

SUBCHAPTER B. EMPLOYEE TRAINING AND EDUCATION

31 TAC §§353.31 - 353.33

The new sections are adopted under Texas Government Code, Chapter 656, Job Notices and Training, §656.048, which requires the board to adopt rules relating to the board's ability to pay for training and education of board members and employees and the obligations of those board members and employees who receive education and training, Texas Government Code, Chapter 2161, Historically Underutilized Businesses, §2161.003, which requires the board to adopt the General Service Commission's rules regarding the historically underutilized businesses program as the board's own rules, Texas Government Code, Chapter 2171, Travel and Vehicle Fleet Services, §2171.1045, which requires the board to adopt rules relating to the assignment and use of the agency's vehicles, and Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 2001.

TRD-200101670
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: April 11, 2001
Proposal publication date: February 2, 2001
For further information, please call: (512) 463-7981

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SUBCHAPTER C. HISTORICALLY UNDERUTILIZED BUSINESSES PROGRAM

31 TAC §353.41

The new sections are adopted under Texas Government Code, Chapter 656, Job Notices and Training, §656.048, which requires the board to adopt rules relating to the board's ability to pay for training and education of board members and employees and the obligations of those board members and employees who receive education and training, Texas Government Code, Chapter 2161, Historically Underutilized Businesses, §2161.003, which requires the board to adopt the General Service Commission's rules regarding the historically underutilized businesses program as the board's own rules, Texas Government Code, Chapter 2171, Travel and Vehicle Fleet Services, §2171.1045, which requires the board to adopt rules relating to the assignment and use of the agency's vehicles, and Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas.

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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Proposal publication date: February 2, 2001
For further information, please call: (512) 463-7981

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SUBCHAPTER E. VEHICLE FLEET SERVICES

31 TAC §353.71

The new sections are adopted under Texas Government Code, Chapter 656, Job Notices and Training, §656.048, which requires the board to adopt rules relating to the board's ability to pay for training and education of board members and employees and the obligations of those board members and employees who receive education and training, Texas Government Code, Chapter 2161, Historically Underutilized Businesses, §2161.003, which requires the board to adopt the General Service Commission's rules regarding the historically underutilized businesses program as the board's own rules, Texas Government Code, Chapter 2171, Travel and Vehicle Fleet Services, §2171.1045, which requires the board to adopt rules relating to the assignment and use of the agency's vehicles, and Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 2001.

TRD-200101671
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: April 11, 2001
Proposal publication date: February 2, 2001
For further information, please call: (512) 463-7981

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CHAPTER 380. ALTERNATIVE DISPUTE RESOLUTION

The Texas Water Development Board (the board) adopts new §§380.1- 380.6, 380.21-380.29, 380.41-380.50, 380.61-380.63 comprising new 31 TAC Chapter 380, Alternative Dispute Resolution, without changes to the proposed text as published in the February 2, 2001 issue of the *Texas Register* (26 TexReg 1097) and will not be republished. The new sections outline procedures for the negotiation and mediation of certain breach of contract claims asserted by contractors against the board pursuant to House Bill 826 §9, 76th. Leg., R.S., Chapter 68 (1999) (codified at Texas Government Code, Chapter 2260).

Historically, the State of Texas has been immune from suit on a contract on the basis of sovereign immunity. Contractors seeking to assert and recover damages on a breach of contract claim had to obtain legislative consent to sue and a legislative appropriation to satisfy any resulting judgment. With the enactment of Chapter 2260, the legislature has established a new and exclusive administrative process by which a contractor who enters into a written contract with a unit of state government for goods, services, or certain projects may pursue a breach of contract claim for damages. Chapter 2260 requires a contractor who asserts a breach of contract claim and the board to attempt to resolve the contractor's claim and any counterclaim through negotiation, and authorizes, but does not require, the parties to mediate their dispute. If the contractor's claim is not resolved in its entirety within the statutory time frame, the contractor may request a contested case hearing before the State Office of Administrative Hearings ("SOAH"). Chapter 2260 authorizes the SOAH administrative law judge to render a non-appealable decision ordering the unit of state government to pay damages up to $250,000. If the contractor's claim exceeds $250,000, Chapter 2260 requires the administrative law judge to issue a written report of his or her findings to the legislature, recommending that the legislature either appropriate money to pay all or part of a valid claim or deny such appropriation and withhold consent to sue.

Texas Government Code, §2260.052(c) requires that the board adopt rules to establish negotiation and mediation provisions. The rules provide a process sufficiently flexible to permit the parties to structure a negotiation or mediation in a manner that is most appropriate for a particular dispute regardless of such variables as the size or organization of the parties, or the subject matter, dollar amount, or method and time of performance.

Chapter 380 is organized into Subchapters A, B, C, and D. Subchapter A, General Provisions, includes §§380.1- 380.6. Section 380.1 states that Chapter 380 governs the negotiation, mediation, and assisted negotiation process of resolving claims for breach of contract asserted by a contractor against the board. Section 380.2 states that Chapter 380 does not apply to claims for personal injury or wrongful death, claims for which there is

a specific remedy under law, or claims based on contracts between the board and governmental entities, subcontractors, or any contract entirely funded with federal funds. Section 380.3 defines terms as they relate to this chapter. Section 380.4 provides that the procedures in Chapter 380 are prerequisites to filing suit under Texas Civil Practice & Remedies Code, Chapter 107 and Texas Government Code, Chapter 2260. Section 380.5 advises that the state has not waived sovereign immunity to suit or to liability. Section 380.6 describes the method the parties will use for computing time under the chapter.

Subchapter B, Negotiation of Contract Disputes, includes §§380.21-380.29. Section 380.21 sets out the requirements and procedures of the notice of claim of breach of contract that the contractor must assert. Section 380.22 sets out the requirements and procedures of the counterclaim that the board must assert. Section 380.23 states that the parties must negotiate to settle the dispute within the timelines established by Texas Government Code, Chapter 2260. Section 380.24 provides a timetable based on the requirements of Texas Government Code, Chapter 2260 as it relates the negotiations between the contractor and the board. Section 380.25 describes how the parties may conduct the negotiation. Section 380.26 addresses the parties' settlement approval procedures. Section 380.27 announces the requirements of any resulting settlement agreement. Section 380.28 states how the costs of negotiations shall be handled by the parties. In the event the breach of contract claim is not resolved in its entirety, §380.29 specifies the process by which a contractor may seek resolution of the dispute by SOAH.

Subchapter C, Mediation of Contract Disputes, includes §§380.41-380.50. Section 380.41 sets the timetable for mediation in accordance with Texas Government Code, Chapter 2260. Section 380.42 sets the parameters for mediation by a neutral third party of breach of contract claims and counterclaims. Section 380.43 discusses how the parties may agree to mediate and select the mediator. Section 380.44 discusses the qualifications, immunities, and duties of a mediator. Section 380.45 pertains to the confidentiality of a mediation and any resulting final settlement agreement. Section 380.46 states how the costs of mediation shall be handled by the parties. Section 380.47 addresses the parties settlement approval procedures. Section 380.48 details the handling of any resulting settlement agreement. Section 380.49 states the requirements for a final settlement and ensures the parties' rights if a partial settlement is reached. Section 380.50 provides that, if mediation does not resolve the dispute, the contractor may request that the claim be referred to SOAH in accordance with §380.24 and §380.29 of this chapter.

Subchapter D, Assisted Negotiation Processes, includes §§380.61-380.63. Section 380.61 states that the parties may agree, either contractually or when a dispute arises, to uses assisted negotiation processes to resolve disputes. Section 380.62 requires parties to agree in writing to the type of assisted negotiation process used and suggests a couple commonly used processes. Section 380.63 requires any assisted negotiation process used to follow the rules for mediation in Subchapter C of this chapter.

There were no comments received on the proposed new sections.

SUBCHAPTER A. GENERAL PROVISIONS

31 TAC §§380.1 - 380.6

The new sections are adopted under Texas Government Code, Chapter 2260, Resolution of Certain Contract Claims against the State, §2260.052, which authorizes the board to adopt rules deemed necessary or advisable to effectuate Chapter 2260, and Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 22, 2001.

TRD-200101665
Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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SUBCHAPTER B. NEGOTIATION OF CONTRACT DISPUTES

31 TAC §§380.21 - 380.29

The new sections are adopted under Texas Government Code, Chapter 2260, Resolution of Certain Contract Claims against the State, §2260.052, which authorizes the board to adopt rules deemed necessary or advisable to effectuate Chapter 2260, and Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas.

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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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SUBCHAPTER C. MEDIATION OF CONTRACT DISPUTES

31 TAC §§380.41 - 380.50

The new sections are adopted under Texas Government Code, Chapter 2260, Resolution of Certain Contract Claims against the State, §2260.052, which authorizes the board to adopt rules deemed necessary or advisable to effectuate Chapter 2260, and Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas.

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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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SUBCHAPTER D. ASSISTED NEGOTIATION PROCESSES

31 TAC §§380.61 - 380.63

The new sections are adopted under Texas Government Code, Chapter 2260, Resolution of Certain Contract Claims against the State, §2260.052, which authorizes the board to adopt rules deemed necessary or advisable to effectuate Chapter 2260, and Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out its powers and duties under the Texas Water Code and laws of Texas.

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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 519. TECHNICAL ASSISTANCE

SUBCHAPTER A. TECHNICAL ASSISTANCE PROGRAM

31 TAC §519.8

The Texas State Soil and Water Conservation Board adopts an amendment to 31 TAC §519.8 setting the maximum hourly pay rate and annual amount that districts may pay for technicians wages or salaries in order to be eligible for reimbursement and procedures for exceptions to the rule, without changes, to the proposed text as published in the January 26, 2001, issue of the *Texas Register* (26 TexReg 941) and will not be republished.

No comments were received regarding adoption of the amendment.

The amendment are adopted under Chapter 201.020 Agriculture Code which provides the Texas State Soil and Water Conservation Board with the authority to adopt rules as necessary for the performance of its functions under the Agriculture Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 21, 2001.

TRD-200101644
Robert G. Buckley
Executive Director
Texas State Soil and Water Conservation Board
Effective date: April 10, 2001
Proposal publication date: January 26, 2001
For further information, please call: (254) 773-2250

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. TEXAS REHABILITATION COMMISSION

CHAPTER 101. GENERAL RULES

40 TAC §101.24

The Texas Rehabilitation Commission (TRC) adopts an amendment to §101.24(b)(5), concerning Responsibilities of the Commissioner, without changes to the proposed text as published in the January 26, 2001, issue of the *Texas Register* (26 TexReg 943).

The amendment is being adopted to comply with the provisions of Human Resources Code §111.024.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Human Resources Code, Title 7, Chapter 111, §111.018 and §111.023, which provides the Texas Rehabilitation Commission with the authority to promulgate rules consistent with Title 7, Texas Human Resources Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 26, 2001.

TRD-200101757
Charles Schiesser
Chief of Staff
Texas Rehabilitation Commission
Effective date: April 15, 2001
Proposal publication date: January 26, 2001
For further information, please call: (512) 424-4050

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PART 5. TEXAS VETERANS LAND BOARD

CHAPTER 175. GENERAL RULES OF THE VETERANS LAND BOARD

40 TAC §175.2

The Veterans Land Board of the State of Texas (the "Board") adopts the proposed amendments to Title 40, Part 5, Chapter 175, §175.2 of the Texas Administrative Code relating to Loan Eligibility Requirements. The amendments are adopted with changes to text as proposed in the December 8, 2000, edition of the *Texas Register* (25 TexReg 12167). New text was added at (f)(3) to clarify the meaning of the paragraph and other nonsubstantive, grammatical and punctuation errors have been corrected throughout the section.

The adopted amendments concern the eligibility of persons to participate in the Veterans Land Program (the "program"). The Board has amended its general rules (Chapter 175) to describe persons eligible to participate in the Veterans Land Program. This adopted amendment changed the order of the text of the rule, created additional subsections, and has defined terms. The adopted amendment will permit the Board to more clearly refer to the provisions of §175.2 (relating to Loan Eligibility Requirements) in other rules.

Section 175.2 (relating to Loan Eligibility Requirements) describes eligibility requirements for the Veterans Land Program. The adopted amendment has also added definitions for the terms "Board," "Bona fide resident," "Missing/Missing in Action," "Program," "Surviving Spouse," "USDVA/VA," and "Veteran." These terms are used in all other sections of Chapter 175 (relating to General Rules of the Veterans Land Board). The adopted amendment has deleted the descriptions of procedures for evidencing eligibility and authorizes the Board to adopt resolutions from time to time that provide for such procedures.

The adopted amendments are a preliminary step to establishing a single standard for eligibility in all loan programs administered by the Board. The adopted amendment has new subsections in the rule and orders the text in such a way that other rules may adopt the provisions of this rule by reference. This adopted amendment protects the best interests of this program by making the eligibility language easier to understand and providing the foundation for a single standard for all loan programs administered by the Board.

No comments were received regarding the proposed amendments.

The section is adopted under the Natural Resources Code, Title 7, Chapter 161, §161.063 (relating to Rules), which provides authorization for the Board to adopt rules concerning the operation of the program, and under Chapter 161, §161.001(b) (relating to Definitions), which authorizes the Board to change the definition of "veteran."

Natural Resources Code 161.001(a)(7) (relating to Definitions) is affected by this adopted action.

§175.2. Loan Eligibility Requirements.

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

(1) Board--The Veterans Land Board of the State of Texas.

(2) Bona fide resident--An individual actually living within the State of Texas with the intention to remain.

(3) Missing/Missing in Action--To have an official designation of "missing status" as provided by Title 37, Chapter 10 of the United States Code relating to Payments to Missing Persons. The term "missing status" means the status of members of a uniformed service who are officially carried or determined to be absent in a status of missing; missing in action; interned in a foreign country; captured; beleaguered, or besieged by a hostile force; or detained in a foreign country against their will.

(4) Program--The Veterans Land Program as authorized by Title 7, Chapter 161 of the Texas Natural Resources Code relating to Veterans Land Board.

(5) Surviving spouse--A person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse) and who has not remarried or (in cases not involving remarriage) has not since the death of the veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of the other person.

(6) USDVA/VA--The United States Department of Veterans Affairs or any successor thereto.

(7) Veteran--A person who satisfies the requirements of subsection (c)(1) of this section.

(b) The Board shall be the final authority in defining and interpreting all eligibility requirements, and whether an applicant has actually satisfied those requirements. The Board may by resolution prescribe the procedures and forms to be used by applicants to evidence eligibility.

(c) To be eligible to participate in the program, an applicant must satisfy one of the following:

(1) be a person who:

(A) is at least 18 years of age;

(B) is a bona fide resident of Texas at the time of application for a loan. Active duty military personnel who otherwise meet the requirements of this subsection are eligible even though stationed outside of Texas at the time of application;

(C) satisfied one of the following service requirements after September 16, 1940:

(i) has served not less than 90 continuous days of active duty or active duty training time in the Army, Navy, Air Force, Coast Guard, Marine Corps, United States Public Health Service, or the reserve component of one of the listed branches of service, unless discharged earlier because of a service-connected cause;

(ii) has completed all initial active duty training required as a condition of the enlistment or appointment in the Texas National Guard; or

(iii) has at least 20 years of active or reserve military service as computed when determining the applicant's eligibility to receive retired pay under applicable federal law.

(D) has not been dishonorably discharged from military service; and

(E) satisfies one of the following:

(i) was a bona fide resident of Texas at the time of enlistment, induction, commissioning, appointment or drafting, or have

been a legal resident of Texas at least two years immediately prior to the date of filing his or her application; or

(ii) has resided in Texas continuously for a least two years immediately before the date of application.

(2) is the surviving spouse of a veteran who died as a result of a service-connected cause, as certified by the USDVA, or who is identified as missing in action, if the spouse satisfies the requirements of subparagraphs (A) and (B) of subsection (c)(1) of this section, and the veteran satisfied the requirements of subparagraphs (C), (D) and (E)(i) of subsection (c)(1) of this section.

(3) is the surviving spouse of a veteran who died after filing an application and contract of sale with the Board, but before the transaction was completed, if he or she meets all other qualification requirements of the Board.

(d) A person may only have one loan at a time as a veteran. However, once that loan is paid in full he or she may apply for an additional loan as a veteran. The foregoing notwithstanding, an individual who is currently participating in the program as a veteran may take an assignment of a contract or contracts as a non-veteran and may bid on a tract or tracts at a forfeited land sale as a non-veteran.

(e) The applicant must sign applications and contracts. An attorney in fact may not sign these documents for an applicant.

(f) No application shall be approved to purchase land under the program:

(1) which provides for or recognizes a second or subordinate lien as a part of the original purchase price for any tract;

(2) where there is evidence that the benefits derived from the use of the land will not pass to the applicant; or

(3) where there exists any other good and sufficient reason to refuse approval, as determined by the chairman of the Board.

(g) If for any reason a veteran's application is not processed to completion, the down payment will be refunded to the veteran, together with the unused portion of any fees that have been deposited with the board.

(h) Each application will be considered as a wholly separate transaction, independent of any other agreement, transaction or contingency. The board will not consider an application which contains a provision making it contingent upon the success or completion of another agreement or transaction.

(i) Any requirement of this section, or of any section within this chapter, which is not otherwise required by the constitution or statutes of this state, may be waived on a case by case basis by the Veterans Land Board. Any waiver request must be in writing and must describe the circumstances surrounding the request, including all of the reasons why the waiver is requested.

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-200101755
Larry R. Soward
Chief Clerk, General Land Office
Texas Veterans Land Board
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Proposal publication date: December 8, 2000
For further information, please call: (512) 305-9129

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CHAPTER 176. VETERANS HOMES

40 TAC §176.1, §176.7

The Veterans Land Board of the State of Texas (the "Board") adopts the proposed amendments to 40 TAC §176.1 relating to Definitions and §176.7 relating to Admission Requirements. The amendments are adopted with nonsubstantive changes to the text as published in the November 17, 2000, edition of the *Texas Register* (25 TexReg 11377). In §176.7(a) the word "quality" has been changed to "qualify" and other nonsubstantive, grammatical or punctuation errors have been corrected throughout both sections.

The adopted action to the rules concern the eligibility of persons to participate in the Veterans Homes program ("the program"). In order to be approved for the benefits of the program, the applicant must: (1) be certified as an eligible Texas veteran, as defined in Chapter 176 (relating to Veterans Homes), and (2) satisfy all medical, financial, and military service requirements of the United States Department of Veterans Affairs (the "USDVA") as set forth in USDVA regulations from time-to-time.

Section 176.1 relating to Definitions now defines terms used in all other sections of Chapter 176 (relating to Veterans Homes). The adopted amendments also correct the definition for "operator" and now has definitions for the terms "spouse" and "surviving spouse."

Section 176.7 relating to Admission Requirements describes eligibility requirements for the program. The adopted amendments now deletes the requirement that applicants be citizens of the United States, increases the scope of eligibility to include the following: a person defined as a veteran, the spouse or surviving spouse of a veteran, or a parent, all of whose children died while serving in the armed forces of the United States. The adopted amendment also restricts eligibility to persons who satisfy the requirements of USDVA guidelines and regulations relating to nursing home care, and authorizes the Board to establish by resolution both procedures for processing applications for admission and a priority system for admitting applicants.

The adopted amendments protect the best interests of the program by qualifying it for all available funding from the USDVA, and establishing a priority system for admitting applicants to State Veterans Homes. This is accomplished by reconciling the program's eligibility requirements with those of the USDVA, and allows the Board to adopt resolutions that implement application processing procedures and priorities for admissions.

The public will further benefit from the expansion of the eligibility criteria of the program. The Board is authorized to modify the definition of an eligible Texas veteran. The adopted amendments extend the benefits of the program to a parent, all of whose children died while serving in the armed forces of the United States. The adopted amendments preserve the program's qualification for funds from USDVA by admitting only those persons who satisfy USDVA guidelines and regulations. Failure to reconcile the program's admission requirements to those of USDVA would result in loss of funding equal to or greater than sixty-five percent (65%) of the cost of construction, plus per diem reimbursements by USDVA for costs of care of residents.

No comments were received regarding the proposed amendments.

The amendments to the sections are adopted under the Natural Resources Code, Title 7, Chapter 164, §164.004, which provides authorization for the Board to adopt rules concerning the operation of veterans homes.

Natural Resources Code, Title 7, Chapter 164, §164.002(a)(6) and §164.005(d) and (e) are affected by this adopted action.

§176.1. Definitions.

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

(1) Board--The Veterans Land Board of the State of Texas.

(2) Bona fide resident--An individual living within the State of Texas, with the intent to remain in Texas.

(3) Chairman--The commissioner of the General Land Office who is also chairman of the Veterans Land Board.

(4) Covenants--The bond covenants undertaken by the Veterans Land Board in association with the sale of bonds.

(5) Fund--The State Veterans Home Fund, which is comprised of the proceeds from the sale of bonds issued for the purpose of acquisition, construction, operation and maintenance of a state veterans home or homes, revenues derived from the operation of one or more state veterans homes, and the proceeds from other sources which are used for the acquisition, construction, operation and maintenance of a state veterans home or homes.

(6) Operator--The entity under contract with the Board to manage a State Veterans Home or Homes.

(7) Spouse --Means a person of the opposite sex who is a wife or husband.

(8) Surviving spouse--A person of the opposite sex who was the spouse of a veteran at the time of the veteran's death, and who lived with the veteran continuously from the date of marriage to the date of the veteran's death (except where there was a separation which was due to the misconduct of, or procured by, the veteran without fault of the spouse) and who has not remarried or (in cases not involving remarriage) has not since the death of the veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of such other person.

(9) State Veterans Home (SVH)--Retirement home, retirement village, home for the aging, or other facility that furnishes shelter, food, medical attention, nursing services, medical services, social activities, or other personal services or attention to veterans.

(10) TDHS--The Texas Department of Human Services.

(11) USDVA--The United States Department of Veterans Affairs or any successor thereto.

§176.7. Admissions Requirements.

(a) The Board finds that it protects the best interests of the State Veterans Home Program to qualify the program for all available funding from the USDVA.

(1) USDVA requires that the program only admit to a SVH those applicants who satisfy all medical, financial, and military service requirements set forth in USDVA regulations, as they are amended from time-to-time.

(2) For purposes of this section, unless the context provides otherwise, the term "veteran" means a person who meets all military service requirements to receive benefits from the USDVA, as those requirements are set forth in 39 U.S.C.A. §101, 38 U.S.C.A. §5303A, and the regulations of the USDVA as amended from time-to-time.

(b) To be eligible for admission to a SVH, an applicant must satisfy one of the following:

(1) be a veteran who:

(A) is at least eighteen years of age;

(B) is a bona fide resident of Texas at the time of application for admission;

(C) was a bona fide resident of Texas at the time of enlistment, induction, commissioning, appointment or drafting, or who has resided in Texas continuously for at least one year immediately before applying for admission;

(D) satisfies the USDVA guidelines and regulations relating to the need for nursing home care; and

(E) is in one of the following categories:

(i) veterans with service-connected disabilities;

(ii) veterans who are former prisoners of war;

(iii) veterans who were discharged or released from active military service for a disability incurred or aggravated in the line of duty;

(iv) veterans who receive disability compensation under 38 U.S.C.A. §1151;

(v) veterans whose entitlement to disability compensation is suspended because of the receipt of retired pay;

(vi) veterans whose entitlement to disability compensation is suspended pursuant to 38 U.S.C.A. §1151, but only to the extent that such veterans' continuing eligibility for nursing home care is provided for in the judgment or settlement described in 38 U.S.C. A. §1151;

(vii) veterans who USDVA determines are unable to defray the expenses of necessary care as specified under 38 U.S.C.A. §1722(a);

(viii) veterans of the Mexican border period or of World War I;

(ix) veterans solely seeking care for a disorder associated with exposure to a toxic substance or radiation or for a disorder associated with service in the Southwest Asia theater of operations during the Persian Gulf War, as provided in 38 U.S.C.A. §1710(e); or

(x) veterans who agree to pay to the United States the applicable co-payment determined under 38 U.S.C.A. §1710(f) and §1710(g).

(2) is a spouse, or surviving spouse, of a veteran if the spouse is at least eighteen (18) years of age and has been a bona fide resident of Texas continuously for at least one (1) year immediately before applying for admission; or

(3) is a parent, all of whose children died while serving in the armed forces of the United States, and who has resided in Texas continuously for at least one year immediately before applying for admission.

(c) The Board may establish, by resolution from time-to-time, procedures for processing applications for admission to each SVH. Based on the availability of space, the Board may also establish a priority system for admitting applicants according to one or more factors, including, but not limited to:

(1) the priority of a veteran over the spouse or parent of a veteran;

(2) the necessity to comply with USDVA regulations governing a SVH, including, but not limited to, the requirement that 75 percent (75%) of a SVH's residents be veterans. However, if the facility was constructed or renovated solely with State funds, only 50 percent (50%) of the residents must be veterans;

(3) whether an applicant meets the eligibility criteria in 40 TAC, Part 5, Chapter 175, §175.2 relating to Loan Eligibility Requirements, and is thereby eligible for other Board benefits;

(4) the date upon which the application for admission was made;

(5) whether the applicant's spouse is also an applicant or a current resident of a SVH;

(6) a request to transfer a resident from one SVH to another to be nearer to family members;

(7) the level of medical treatment and care required by the applicant;

(8) the characteristics and extent of financial resources available to the applicant;

(9) whether the applicant would otherwise meet institutional Medicaid eligibility criteria, as determined by the TDHS, but state Medicaid payments will not be used as part of the applicant's payment for care and residence costs; and

(10) such other criteria as the Board may determine are in the best interest of the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101754
Larry R. Soward
Chief Clerk, General Land Office
Texas Veterans Land Board
Effective date: April 12, 2001
Proposal publication date: November 17, 2000
For further information, please call: (512) 305-9129

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CHAPTER 177. VETERANS HOUSING ASSISTANCE PROGRAM

40 TAC §177.5

The Veterans Land Board of the State of Texas (the "Board") adopted the proposed amendments to Title 40, Part 5, Chapter 177, §177.5 of the Texas Administrative Code relating to Loan Eligibility Requirements concerning the eligibility of persons to participate in the Veterans Housing Assistance Program (the "program"). The amendments are adopted without changes to the text as published in the December 8, 2000, edition of the *Texas Register* (25 TexReg 12170). The text of the rule will not be republished.

The section now refers to Title 40, Part 5, Chapter 175, §175.2 of the Texas Administrative Code (relating to Loan Eligibility Requirements) for a description of persons eligible to participate in this program. (Amendments to §175.2 relating to Loan Eligibility Requirements are being proposed simultaneously in a separate submission.)

Section 177.5 (relating to Loan Eligibility Requirements) describes eligibility requirements for the Veterans Housing Assistance Program and has deleted the description of eligibility for the program and refers to the description contained in Chapter 175, §175.2 (relating to Loan Eligibility Requirements). The descriptions of procedures for evidencing eligibility and authorizes the Board to adopt resolutions from time to time that provide for such procedures have also been deleted. Any required program-specific eligibility requirements have been retained in the adopted section. The adopted amendments effectuate the intent of the Board to establish a single standard for eligibility in all loan programs it administers and protects the best interests of this program by making the eligibility language easier to understand and providing that any future changes in the eligibility requirements made in the General Rules of the Board will automatically apply to this program.

No comments were received concerning the proposed amendments.

The amendments to the sections are adopted under the Natural Resources Code, Title 7, Chapter 161, §161.063 (relating to Rules), which provides authorization for the Board to adopt rules concerning the operation of the program, and under Chapter 161, §161.001(b) (relating to Definitions), which authorizes the Board to change the definition of "veteran."

Natural Resources Code 161.001(a)(7) (relating to Definitions) is affected by this adopted action.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101753
Larry R. Soward
Chief Clerk, General Land Office
Texas Veterans Land Board
Effective date: April 12, 2001
Proposal publication date: December 8, 2000
For further information, please call: (512) 305-9129

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PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES

The Texas Department of Protective and Regulatory Services (TDPRS) adopts amendments to §700.1321 and §700.2501, without changes to the proposed text published in the February 9, 2001, issue of the *Texas Register* (26 TexReg 1248).

The justification for the amendments is to allow TDPRS to engage in open enrollment for residential contracts at Levels-of-Care 4, 5, and 6 with certain for-profit entities that are licensed by other state agencies.

The amendments will function by having a greater number of placement resources available to children in the conservatorship of TDPRS. It is anticipated that these newly available placements

will be able to meet the specialized needs of children with high levels of care.

No comments were received regarding adoption of the amendments.

SUBCHAPTER M. SUBSTITUTE-CARE SERVICES

40 TAC §700.1321

The amendment is adopted under the Human Resources Code (HRC), §40.029, which provides the Department with the authority to propose and adopt rules to implement departmental programs.

The amendment implements Title IV-E of the Social Security Act, and 45 Code of Federal Regulations, §1355.20.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101729
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: April 12, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER Y. CONTRACTING WITH LICENSED RESIDENTIAL CHILD-CARE PROVIDERS

40 TAC §700.2501

The amendment is adopted under the Human Resources Code (HRC), §40.029, which provides the Department with the authority to propose and adopt rules to implement departmental programs.

The amendment implements Title IV-E of the Social Security Act, and 45 Code of Federal Regulations, §1355.20.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101730
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: April 12, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER P. PREPARATION FOR ADULT LIVING

40 TAC §§700.1601 - 700.1604

The Texas Department of Protective and Regulatory Services (TDPRS) adopts the repeal of §§700.1601-700.1604, and adopts new §§700.1601-700.1604, in its Child Protective Services chapter. New §700.1603 and §700.1604 are adopted with changes to the proposed text published in the February 9, 2001, issue of the *Texas Register* (26 TexReg 1249). The repeal of §§700.1601-700.1604, and new §700.1601 and §700.1602 are adopted without changes to the proposed text and will not be republished.

The justification for the repeals and new sections is to authorize the Preparation for Adult Living (PAL) Program to establish in policy the types and amounts of assistance to be provided and any conditions or criteria that must be met to receive benefits, and give program the flexibility to establish and adjust the details of benefits and services to meet the needs of the youth it is intended to serve. Provision of services and benefits is subject to available funding. The new sections require compliance with the federal Chafee Foster Care Independence Act, and define the broader target population required by the federal law. The new rules are written using plain language so they are easier to understand.

The repeals and new sections will function by providing program more flexibility to establish and adjust services and benefits to youth that will best meet the purpose and objective of the program. The program will be more responsive to changing needs. The anticipated results will be better outcomes for youth in adult living.

During the public comment period, TDPRS received comments from the Texas Association of Leaders in Children and Family Services. A summary of the comments and TDPRS's responses follow:

Comment concerning §700.1603: The commenter suggested that the rule include a provision for case management services while PAL participants receive monetary assistance.

Response: In the first sentence of subsection (c), TDPRS made a minor modification and added the phrase "and related services" after "monetary assistance." With this change, the rule will specifically reference and authorize the provision of support services related to the receipt of monetary assistance.

Comment concerning §700.1604: The commenter expressed concern that the rule was too restrictive by preventing PAL participants from receiving financial assistance while living with biological or adoptive parents, stepparents, or an alleged perpetrator. Since many youth go back to their biological family after leaving foster care, the commenter suggested that financial assistance, together with case management services to monitor its use, be provided to these youth.

Response: Staff evaluated this comment and TDPRS is adopting this section, with a modification. Subsection (a)(4) will now read: "not be living with a designated perpetrator while receiving financial benefits." Staff will take these comments into consideration during the revision and development of policy on this topic. The living arrangement of a youth with "biological parents, adoptive parents, or stepparents" may be an eligibility criterion as determined by fiscal responsibility and financial needs of the youth.

The repeals are adopted under the Human Resources Code, §40.029, which provides the Department with the authority to

propose and adopt rules in compliance with state law and to implement departmental programs.

The repeals implement changes made to Title IV-E of §477 of the Social Security Act (42 U.S.C. 677) by the Chafee Foster Care Independence 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 March 23, 2001.

TRD-200101727
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: April 16, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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The new sections are adopted under the Human Resources Code, §40.029, which provides the Department with the authority to propose and adopt rules in compliance with state law and to implement departmental programs.

The new sections implement changes made to Title IV-E of §477 of the Social Security Act (42 U.S.C. 677) by the Chafee Foster Care Independence Act.

§700.1601. What is the Preparation for Adult Living (PAL) Program?

The Preparation for Adult Living (PAL) Program provides services and benefits to help prepare young people to live independently when they leave foster care. PAL Program funds can be used to provide any of the services and benefits authorized by the federal Chafee Foster Care Independence Program, the requirements of which must be met. Funding for the PAL Program is limited to the state, local, and federal funds allocated to PRS for this program.

§700.1602. Whom is the PAL Program designed to serve?

(a) The PAL Program is designed to serve the following young people:

(1) those who are at least 16 years old and likely to remain in foster care until at least age 18; and

(2) those who are younger than 21 years old and who left foster care when they were at least age 18.

(b) With funding availability, appropriate services may also be extended to individuals as young as 14 years old who are likely to remain in foster care until at least age 18.

§700.1603. What types of services and benefits are available to PAL Program participants?

(a) The program provides an individual assessment of the participant's general readiness to live independently as an adult.

(b) The program provides training to help young people prepare for independent living once they leave foster care and addresses topics such as the following:

(1) personal and interpersonal skills;

(2) employment and job skills;

(3) money management;

(4) housing and transportation;

(5) personal health; and

(6) planning for the future.

(c) The program may provide monetary assistance and related services to eligible young people for transitional expenses and independent living needs. The types and amounts of assistance must be established in policy and are subject to the availability of funds. Monetary assistance may include:

(1) a transitional living allowance;

(2) a household supplies stipend; and

(3) assistance with room and board for young people who have left foster care because of age.

§700.1604. Are there specific requirements for young people to meet before receiving PAL Program benefits?

(a) The PAL Program may establish in policy specific conditions or criteria that young people must meet to receive program benefits, provided such requirements are designed to help achieve the purposes and objectives of the program. Specific conditions or criteria may include, but are not limited to, requirements that the young person:

(1) attend training (if able);

(2) be employed or actively seeking employment (if able), or attending school or vocational or technical training;

(3) meet need-based criteria for monetary assistance;

(4) not be living with a designated perpetrator while receiving financial benefits; and

(5) not be incarcerated.

(b) Any young persons whom the PAL Program is designed to serve, as described in §700.1602 of this title (relating to Whom is the PAL Program designed to serve?), must be informed of any requirements that they must meet to receive benefits.

(c) No benefits are available to any young persons after their 21st birthday.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101728
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: April 16, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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CHAPTER 710. PROTECTION OF CLIENTS AND STAFF

The Texas Department of Protective and Regulatory Services (TDPRS) adopts the repeal of Chapter 710, consisting of §§710.1-710.15 and 710.41-710.55, without changes to the proposed text published in the February 9, 2001, issue of the *Texas Register* (26 TexReg 1250).

As part of the rule review process, TDPRS is repealing Chapter 710, and adopting new Chapter 711, Investigations in TDMHMR

Facilities and Related Programs. The new chapter adds information about home and community-based services investigations, and is written using plain language to make it easier to understand. New Chapter 711 is included in this issue of the *Texas Register*.

The repeals will function by allowing new sections to be adopted that are better organized and easier to understand.

No comments were received regarding adoption of the repeals.

SUBCHAPTER A. ABUSE, NEGLECT, AND EXPLOITATION OF PERSONS SERVED BY TDMHMR FACILITIES AND STATE-OPERATED COMMUNITY SERVICES

40 TAC §§710.1 - 710.15

The repeals are adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The repeals implement the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101717
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER B. ABUSE, NEGLECT, AND EXPLOITATION OF PERSONS SERVED BY COMMUNITY MENTAL HEALTH AND MENTAL RETARDATION CENTERS

40 TAC §§710.41 - 710.55

The repeals are adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The repeals implement the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101718
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
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CHAPTER 711. INVESTIGATIONS IN TDMHMR FACILITIES AND RELATED PROGRAMS

The Texas Department of Protective and Regulatory Services (TDPRS) adopts new Chapter 711, Investigations in TDMHMR Facilities and Related Programs. New §711.3 and §711.613 are adopted with changes to the proposed text published in the February 9, 2001, issue of the *Texas Register* (26 TexReg 1252). New §§711.1, 711.5, 711.7, 711.9, 711.11, 711.13, 711.15, 711.17, 711.19, 711.21, 711.23, 711.201, 711.401, 711.403, 711.405, 711.407, 711.409, 711.411, 711.413, 711.415, 711.417, 711.419, 711.421, 711.423, 711.425, 711.601, 711.603, 711.605, 711.607, 711.609, 711.611, 711.801, 711.1001, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1013, 711.1201, 711.1203, 711.1205, 711.1207, and 711.1209 are adopted without changes to the proposed text and will not be republished.

The justification for the new chapter is to add information about home and community-based services investigations, and rewrite the sections using plain language so they are easier to understand.

The new chapter will function by providing sections that are better organized and easier to understand.

During the comment period, TDPRS received comments from Denton State School, Life Management Center, Kerrville State Hospital, Terrell State Hospital, Texas Council of Community MHMR Centers, and two individuals. A summary of the comments and TDPRS's responses follow:

Comments concerning § 711.3, How are the terms in this chapter defined?

1) One commenter suggested changing the definition of "allegation" to read, "A report by an individual that a person served is suspected to be in a state of abuse, neglect, or exploitation as defined by this subchapter.

Response: Staff believe the definition as published is sufficiently clear. PRS is adopting this definition without change.

2) One commenter questioned the legality of the definition of "child."

Response: The definition as proposed is legally correct and is consistent with the definition of "adult" in this subchapter and in HRC, Chapter 48. PRS is adopting this definition without change.

3) One commenter stated that the definition of an "individual with a disability receiving services" is too broad and does not specify what disabilities it applies to.

Response: This definition is included in the rules in response to legislative mandate. During the 76th Legislature, Human Resources Code, (HRC) §48 was amended to require the department by rule to define who is "an individual with a disability receiving services." The definition in the rules clarifies who such individuals are within the context of these rules. PRS is adopting this definition without change.

4) One commenter questioned whether certain other professionals should be added to the definition of "mental health services provider."

Response: The definition is consistent with the definition found in the Texas Civil Practice and Remedies Code, §81.001. PRS is adopting this definition without change.

5) One commenter suggested changing the definition of "perpetrator" to read, "A person who is suspected to have committed an act of abuse, neglect, or exploitation."

Response: Staff believe the definition is clear. Throughout the rules, the term "alleged" perpetrator is used, as appropriate, to indicate a person who is suspected to have committed an act of abuse, neglect, or exploitation. PRS is adopting this definition without change.

6) One commenter noted that the definition of "person served" is too restrictive. By relying on entry into the Client Assignment and Registration (CARE) system, certain individuals who receive services from community centers and local authorities would be excluded from protection by APS. The definition also excludes children.

Response: TDPRS agrees. The definition has been amended to include all individuals served by a community center or local authority for whom the department is mandated to provide investigatory services if abused, neglected, or exploited. Language has also been added to include children.

7) One commenter noted that the definition of "person served" is written too broadly and should more explicitly describe what is considered a disability.

Response: The definition, as amended, clarifies who such individuals are within the context of these rules. This definition is linked to the definition of an "Individual with a disability receiving services."

8) Two commenters questioned the definition of "serious physical injury" feeling that the phrase, "any injury determined to be serious by the appropriate medical personnel" leaves too much latitude as to who may make the determination.

Response: The definition is intended to acknowledge that a physician may not always be immediately available to make this determination, depending on the type of program involved. A physician may be available in a facility, but not in a community center or home and community based (HCS) setting. PRS is adopting this definition without change.

Comment concerning §711.7, What does APS not investigate under this chapter? One commenter recommended that psychologists and social workers be added to the list of professionals that APS does not investigate if the allegation involves clinical practice.

Response: TDMHMR's current rules do not provide for peer review for its social workers and psychologists. The rules of both agencies should be consistent and not conflict. PRS is adopting this section without change.

Comments concerning §711.9, How does APS determine if it has jurisdiction to investigate in certain situations?

1) Two commenters questioned the accuracy of the table related to APS not investigating an allegation if the person served is also an employee of the program and the alleged perpetrator is not assigned to the care and treatment of the person served.

Response: This section accurately describes the position of APS for such allegations. This is a situation where an employee of a program, who was hired through a competitive procurement process, also happens to be receiving services from the program. If the alleged perpetrator is assigned to the care and treatment of the person served, APS would investigate; if the alleged perpetrator is not assigned to the care and treatment of the person served, the matter would be referred to the administrator of the program. PRS is adopting this section without change.

2) One commenter stated the meaning of the phrase, "as part of treatment plan or supported employment," is unclear in context with the rest of the phrases it is connected with.

Response: The phrase, "If the alleged victim is a person served as part of treatment plan or supported employment," is intended to describe a situation where a person served, as a result of the treatment planning process, works for the program or in a supported employment situation. This is in contrast to "a person served and an employee of the program" where the person served was selected for employment in the program through a competitive employment process. PRS is adopting this section without change.

Comment concerning §711.11, How is physical abuse defined? One commenter suggested that §711.11(3) regarding chemical or bodily restraints on a person served not in compliance with federal and state laws be amended to state "excluding documentation provisions of these laws." The commenter stated that employees are being confirmed for abuse not having a doctor's order in place.

Response: Federal and state laws require that a doctor's order be obtained prior to chemical or bodily restraint for the protection of the person served. If a person served is restrained without a doctor's order, this would constitute abuse. In certain emergency situations a doctor's order can be obtained after the restraint and this would not be considered abuse. PRS is adopting this section without change.

Comment concerning §711.13, How is sexual abuse defined? One commenter suggested that §711.13 (1), (2), and (3) be eliminated and (4) changed to eliminate "with sexual intent." The commenter states that intent is within someone's mind and difficult to ascertain.

Response: While intent may be in someone's mind, it is the behavioral manifestation of that intent that is at issue here. There are differences between a supportive, therapeutic hug and one that involves sexual intent on the part of the employee, agent, or contractor. Intent is evaluated during the investigative process. PRS is adopting this section without change.

Comment concerning §711.15, How is sexual exploitation defined? One commenter recommended changing the definition

of "sexual exploitation" to include the wording "for the purpose of one's personal benefit or gain."

Response: This section defines sexual exploitation in accordance with the Texas Civil Practice and Remedies Code, §81.001, and is linked to the definition of "mental health services provider." PRS is adopting this section without change.

Comment concerning §711.19, How is neglect defined? One commenter suggested that §711.19 (1) is too broad and should be reworded. The commenter stated that interdisciplinary teams may not always predict everything perfectly and so may not establish a program or may establish a program that other staff may not be able to carry out.

Response: Section 711.7(2)(D) (relating to What does APS not investigate under this chapter?), states that APS does not investigate an allegation if it relates solely to a general complaint, such as failure to carry out a person served's program or treatment plan, if the allegation does not relate to a specific incident involving a specific person served. PRS is adopting this section without change.

Comment concerning §711.201, What is your duty to report if you are an employee, agent, or contractor of a facility, local authority, community center, or HCSW? One commenter suggested adding a requirement that the person making a report of abuse, neglect, or exploitation be required to make provision for the safety and welfare of the alleged victim.

Response: This section describes the requirement for employees, agents, or contractors of a facility, local authority, community center, or home and community-based services wavier program (HCSW) to report suspected abuse, neglect or exploitation to PRS. Instructions to provide for the safety and welfare of the alleged victim would more appropriately be found in TDMHMR rules. PRS is adopting this section without change.

Comment concerning §711.401, Who does the investigator notify of an allegation and when is the identity of the reporter revealed? One commenter questioned why the investigator would not notify law enforcement of an allegation of sexual exploitation.

Response: The section states that the investigator is to notify law enforcement of allegations involving sexual abuse (which is defined to include sexual exploitation in §711.13) of an adult and all allegations involving a child. PRS is adopting this section without change.

Comment concerning §711.403, Who and when does the investigator notify upon receiving an allegation that relates to a general complaint? One commenter questioned why the Office of Consumer Services and Rights Protection - Ombudsman Office (CSRP) at TDMHMR is only notified of allegations involving a general complaint relating to an HCSW.

Response: HCSWs, unlike TDMHMR facilities, local authorities, and community centers, do not have a designated client rights protection officer to address general complaints. As a result, the investigator notifies CSRP so that office may intervene, if appropriate. PRS is adopting this section without change.

Comment concerning §711.405, What action does the investigator take if the alleged perpetrator is a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a facility? One commenter questioned why, for community centers, other professional groups are not included in the peer review process.

Response: This section applies to facilities and not to community centers. Professional review for other professional groups in community centers is addressed in §711.411. This section clarifies that such allegations are referred to the administrator for professional review and that APS also conducts an investigation. PRS is adopting this section without change.

Comments concerning § 711.407, What action does the investigator take if the alleged perpetrator is a licensed professional other than a physician, dentist, registered nurse, licensed vocational nurse, or pharmacist for a facility? Two commenters noted there is no provision for an issue of clinical practice to be referred to peer review if it involves a professional other than a physician, dentist, nurse, or pharmacist.

Response: Within the TDMHMR system, peer review is only available for physicians, dentists, nurses and pharmacists. An allegation involving a member of another professional group is therefore investigated by APS. PRS is adopting this section without change.

Comments concerning § 711.413, How are investigations prioritized? Two commenters questioned why the severity of the alleged incident is not a factor in determining the priority of the investigation.

Response: The priority system in the rule is consistent with current practice and has been in effect for three and one-half years. The system, as agreed upon by PRS, TDMHMR, and Advocacy, Incorporated, is built upon the length of time between the actual incident and the date of the report to PRS. Allegations reported soon after they occur are more likely to yield evidence useful to the investigation than allegations reported a long time after they occur, and therefore, warrant a quicker response. PRS is adopting this section without change.

Comment concerning §711.417, When must the investigator complete the investigation? One commenter suggested that this section be amended to include the requirement for a five-day preliminary report necessary to meet federal regulations for investigations in ICFMRs.

Response: The federal requirement referred to is incumbent on ICFMR facilities, not on PRS. PRS has policy in place to require the five-day preliminary report. PRS is adopting this section without change.

Comment concerning §711.419, What if the investigator cannot complete the investigation on time? One commenter stated that a facility should be notified when an extension is granted.

Response: Section 711.419(c) states that the investigator must notify the administrator of all extensions. PRS is adopting this section without change.

Comment concerning §711.425, How are allegations classified? One commenter suggested eliminating the phrase "may have" in relation to the seriousness of the injury. A suggested rephrasing would be: Class I abuse - "physical abuse that caused a serious injury or was noted by a physician as likely to have caused a serious injury." Class II abuse - "physical abuse that caused a non-serious injury or was noted by a physician as likely to have caused a non-serious injury."

Response: These proposed classifications are consistent with those found in MHMR companion rules. The classification system is used to guide administrators determine the appropriate form of disciplinary action to take against a confirmed perpetrator. Should TDMHMR determine it is appropriate to change

the classification system, PRS would consider a corresponding change. PRS is adopting this section without change.

Comment concerning §711.611, Is the victim or alleged victim, guardian, or parent notified of the finding? One commenter stated that the victim or alleged victim could be traumatized by receiving notification of the finding. The commenter suggested amending the rule to read, "Yes. The victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child) is notified, if appropriate . . ."

Response: This section clarifies that TDMHMR and its related programs are responsible for such notifications. PRS is adopting this section without change.

Comments concerning §711.613, Can the investigative report be released?

1) One commenter noted that contractors of facilities, local authorities, community centers, and HCSWs should be included among those who may release the investigative report to the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child).

Response: PRS agrees. The section has been amended to include contractors.

2) One commenter noted that contrary to current practice, administrators of community centers and local authorities, and contractor CEOs, are not authorized to release the investigative report to the perpetrator or alleged perpetrator. The commenter recommended that such language be added.

Response: TDPRS agrees. The section has been amended to authorize the administrator of a community center or local authority, and a contractor CEO, to release the investigative report to the perpetrator or alleged perpetrator.

Comment concerning §711.801, What action does the investigator take if a person served by an HCSW needs emergency services? One commenter stated that this section implies that consideration of HCSW issues are more important than the consideration of the condition, welfare or threat to the person served. The commenter suggested deleting items (1) - (4) and replacing them with items concerning the person served.

Comment concerning §711.1007, How is the review of a finding conducted? One commenter recommended that language be added require to reviewer to notify the facility if the review process is going to exceed 14 days.

Response: It is current practice to notify the facility when it takes longer than 14 days to complete a review. PRS is adopting this section without change.

Response: TDMHMR contracts with HCSW providers to provide care to HSCW clients. In some parts of the state, the nearest APS office may be many miles away from an HCSW site. The proposed rule is written to allow for flexibility; in some instances it may be appropriate and more efficient for the HCSW provider to address an emergency situation, while in others it may be more appropriate for APS to do so. Items (1) - (4) are issues the investigator is to consider when deciding on the best course of action to protect the person served. PRS is adopting this section without change.

Comments concerning § 711.1201, Who may request an appeal?

1) Two commenters noted that the alleged perpetrator is not afforded the opportunity to request an appeal. As a result, a confirmation will remain on CAPS and be subject to disclosure to other state agencies even if the confirmation is overturned by the TDMHMR grievance process. The commenter recommends that the alleged perpetrator be given the right to appeal the decision of the investigator.

Response: Investigation findings are not routinely disclosed to other state agencies other than TDMHMR. If findings are disclosed to another agency or entity, the perpetrator is offered a release hearing.

2) One commenter stated that Advocacy, Incorporated should only be involved if the victim or alleged victim does not have a guardian or the guardian has asked for their help.

Response: Advocacy, Incorporated is mentioned here to cover two situations. One is where Advocacy actually represents the victim or alleged victim through mutual agreement or with the consent of the legal guardian, if appropriate. The other is when the victim or alleged victim does not have a legal guardian and lacks the capacity to make decisions in his or her own best interest due to a physical or mental condition. PRS is adopting this section without change.

SUBCHAPTER A. INTRODUCTION

40 TAC §§711.1, 711.3, 711.5, 711.7, 711.9, 711.11, 711.13, 711.15, 711.17, 711.19, 711.21, 711.23

The new sections are adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The new sections implement the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

§711.3. How are the terms in this chapter defined?

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

(1) Administrator--The person in charge of a facility, local authority, community center, or home and community-based services waiver program, or designee.

(2) Adult--An adult is a person:

(A) 18 years of age or older; or

(B) under 18 years of age who:

(i) is or has been married; or

(ii) has had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(3) APS--Adult Protective Services, a division of PRS.

(4) Agent--An individual (e.g., student, volunteer), not employed by but working under the auspices of a:

(A) facility, local authority, community center, or home and community-based services waiver program; or

(B) contractor of one of the programs listed in subparagraph (A) of this paragraph.

(5) Allegation--A report by an individual that a person served has been or is in a state of abuse, neglect, or exploitation as defined by this subchapter.

(6) Child--A person under 18 years of age who:

(A) is not and has not been married; or

(B) has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(7) Clinical practice--Relates to the demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described in the Nursing Practice Act, Vocational Nurse Act, Dental Practice Act, Pharmacy Practice Act, or Medical Practice Act.

(8) Community center--A community mental health center, community mental retardation center, or community mental health and mental retardation center, established under the Texas Health and Safety Code, Title 7, Chapter 534, Subchapter A.

(9) Contractor--Any organization, entity, or individual who contracts with a facility, local authority, community center, or HCSW to provide mental health and/or mental retardation services directly to a person served. The term includes a local independent school district with which a facility, local authority, or community center has a memorandum of understanding (MOU) for educational services.

(10) Contractor CEO--The person in charge of a contractor that has one or more employees, excluding the CEO.

(11) CSRP or Consumer Services and Rights Protection--Ombudsman Office--The office at TDMHMR's Central Office charged with protecting the rights of persons served.

(12) Emergency order for protective services--A court order for protective services obtained under Human Resources Code, §48.208.

(13) Emergency services--Services necessary to immediately protect a person served by an HCSW from serious physical harm or death. Examples include, but are not limited to, arranging for:

(A) an emergency order for protective services;

(B) shelter;

(C) medical and psychiatric assessments and/or treatment; and

(D) food, medication, or other supplies.

(14) Facility--A state hospital, state school, or state center that is operated by TDMHMR.

(15) Home and community-based services waiver program (HCSW)--Community-based Medicaid waiver programs authorized under the Social Security Act, §1915(c), operated by TDMHMR under the authority of the Texas Health and Human Services Commission, which are the:

(A) Home and Community-based Services Program (HCS), governed by 25 TAC Chapter 419, Subchapter D (relating to Home and Community-based Services (HCS) Program);

(B) Mental Retardation Local Authority Program (MRLA), governed by 25 TAC Chapter 409, Subchapter L (relating to Mental Retardation Local Authority (MRLA) Pilot Program); and

(C) Home and Community-based Services-OBRA (HCS-O) Program, governed by 25 TAC Chapter 419, Subchapter P (relating to Home and Community-based Services - OBRA (HCS- O) Program).

(16) Incitement--To spur to action or instigate into activity; implies responsibility for initiating another's actions.

(17) Individual with a disability receiving services--A disabled person as defined in the Human Resources Code, Chapter 48, receiving services from a:

(A) facility, local authority, community center, HCSW; or

(B) contractor or agent of one of the programs listed in subparagraph (A) of this paragraph.

(18) Investigator--An employee of the division of Adult Protective Services who has:

(A) demonstrated competence and expertise in conducting investigations; and

(B) received training on techniques for communicating effectively with individuals with a disability.

(19) Local authority--An entity designated by the TDMHMR commissioner in accordance with the Texas Health and Safety Code, §533.035(a).

(20) Mental health services provider--In accordance with the Texas Civil Practice and Remedies Code, §81.001, an individual, licensed or unlicensed, who performs or purports to perform mental health services, including a:

(A) licensed social worker as defined by the Human Resources Code, §50.001;

(B) chemical dependency counselor as defined by Texas Civil Statutes, Article 4512o;

(C) licensed professional counselor as defined in §2 of the Licensed Professional Counselor Act, (Texas Civil Statutes, Article 4512g);

(D) licensed marriage and family therapist as defined in §2, Licensed Marriage and Family Therapist Act, (Texas Civil Statutes, Article 4512c-1);

(E) member of the clergy;

(F) physician who is practicing medicine as defined in §1.03 of the Medical Practice Act, (Texas Civil Statutes, Article 4495b);

(G) psychologist offering psychological services as defined in §2 of the Psychologists' Certification and Licensing Act, (Texas Civil Statutes, Article 4512c); or

(H) special officer for mental health assignment certified under the Government Code, §415.037.

(21) Non-serious physical injury--Any injury determined not to be serious by the appropriate medical personnel. Examples of non-serious physical injury include the following:

(A) superficial laceration;

(B) contusion two and one-half inches in diameter or smaller; or

(C) abrasion.

(22) Peer review--A review of clinical and/or:

(A) medical practice(s) by peer physicians;

(B) dental practice(s) by peer dentists;

(C) pharmacy practice(s) by peer pharmacists; or

(D) nursing practice(s) by peer nurses.

(23) Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(24) Person served--An individual with a disability receiving services, or a child receiving services in a:

(A) facility or HCSW who is registered or assigned in the Client Assignment and Registration (CARE) system; or

(B) community center or local authority who is registered or assigned in CARE or who is otherwise receiving services from a community center or local authority, either directly or by contract.

(25) Preponderance of evidence--The greater weight of evidence, or evidence which is more credible and convincing to the mind.

(26) Prevention and management of aggressive behavior (PMAB)--TDMHMR's proprietary risk management program that uses the least intrusive, most effective options to reduce the risk of injury for persons served and staff from acts or potential acts of aggression.

(27) Professional review--A review of clinical and/or professional practice(s) by peer professionals.

(28) Program--A facility, local authority, community center, or HCSW.

(29) PRS--Texas Department of Protective and Regulatory Services.

(30) Reporter--The person, who may be anonymous, making an allegation.

(31) Serious physical injury--Any injury determined to be serious by the appropriate medical personnel. Examples of serious physical injury include the following:

(A) fracture;

(B) dislocation of any joint;

(C) internal injury;

(D) contusion larger than two and one-half inches in diameter;

(E) concussion;

(F) second or third degree burn; or

(G) any laceration requiring sutures.

(32) Sexually transmitted disease--Any infection with or without symptoms or clinical manifestations that can be transmitted from one person to another by sexual contact.

(33) TDMHMR--Texas Department of Mental Health and Mental Retardation.

(34) Victim--A person served who is alleged to have been abused, neglected, or exploited.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101719

C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER C. DUTY TO REPORT

40 TAC §711.201

The new section is adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The new section implements the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101720
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER E. CONDUCTING THE INVESTIGATION

40 TAC §§711.401, 711.403, 711.405, 711.407, 711.409, 711.411, 711.413, 711.415, 711.417, 711.419, 711.421, 711.423, 711.425

The new sections are adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The new sections implement the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101721

C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER G. RELEASE OF REPORT AND FINDINGS

40 TAC §§711.601, 711.603, 711.605, 711.607, 711.609, 711.611, 711.613

The new sections are adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The new sections implement the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

§711.613. Can the investigative report be released?
Yes, but any information must be concealed that would reveal the identities of the reporter and any person served who is not the victim or alleged victim. Upon request, the investigative report may be released to:

(1) for facilities and their contractors, the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with 25 TAC §417.511(b) (relating to Confidentiality of Investigative Process and Report), or perpetrator in accordance with 25 TAC §417.512(d) (relating to Classifications and Disciplinary Actions);

(2) for local authorities, community centers, and their respective contractors:

(A) the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with 25 TAC §414.559(b) (relating to Confidentiality of Investigative Process and Report); and

(B) the perpetrator or alleged perpetrator by the administrator or contractor CEO; and

(3) for HCSWs and their contractors, the victim or alleged victim, guardian, or parent (if the victim or alleged victim is a child), in accordance with:

(A) 25 TAC Chapter 419, Subchapter D (relating to Home and Community-based Services (HCS);

(B) 25 TAC Chapter 409, Subchapter L (relating to Mental Retardation Local Authority Pilot (MRLA) Program); or

(C) 25 TAC Chapter 419, Subchapter P (relating to Home and Community-based Services - OBRA (HCS-O) Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101722
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER I. PROVISION OF SERVICES

40 TAC §711.801

The new section is adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The new section implements the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101723
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER K. REQUESTING A REVIEW OF FINDING IF YOU ARE THE ADMINISTRATOR OR CONTRACTOR CEO

40 TAC §§711.1001, 711.1003, 711.1005, 711.1007, 711.1009, 711.1011, 711.1013

The new sections are adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The new sections implement the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101724

C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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SUBCHAPTER M. REQUESTING AN APPEAL IF YOU ARE THE REPORTER, ALLEGED VICTIM, LEGAL GUARDIAN, OR WITH ADVOCACY, INCORPORATED

40 TAC §§711.1201, 711.1203, 711.1205, 711.1207, 711.1209

The new sections are adopted under the Human Resources Code (HRC), Title 2, §48.255 and §48.355, which provides the department with the right to investigate reports of abuse, exploitation, or neglect of an elderly or disabled person; and the Texas Family Code, §261.404, which requires the department to develop joint rules with the Texas Department of Mental Health and Mental Retardation (TDMHMR) to facilitate investigations in TDMHMR facilities and related programs.

The new sections implement the Human Resources Code, §48.255 and §48.355, and the Texas Family Code, §261.404.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 23, 2001.

TRD-200101725
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Effective date: May 1, 2001
Proposal publication date: February 9, 2001
For further information, please call: (512) 438-3437

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Board of Chiropractic Examiners

Title 22, Part 3

The Texas Board of Chiropractic Examiners proposes to readopt Chapter 76, relating to Formal SOAH Proceedings, in accordance with the 1997 Appropriations Act, section 167.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposal may be submitted to Joyce Kershner, Director of Licensure, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305-6709.

TRD-200101816
Gary K. Cain, Ed. D.
Executive Director
Texas Board of Chiropractic Examiners
Filed: March 28, 2001

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The Texas Board of Chiropractic Examiners proposes to readopt Chapter 78, relating to Chiropractic Radiologic Technologists, in accordance with the 1997 Appropriations Act, section 167.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposal may be submitted to Joyce Kershner, Director of Licensure, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305-6709.

TRD-200101817
Gary K. Cain, Ed. D.
Executive Director
Texas Board of Chiropractic Examiners
Filed: March 28, 2001

♦ ♦ ♦

The Texas Board of Chiropractic Examiners proposes to readopt Chapter 79, relating to Provisional Licensure, in accordance with the 1997 Appropriations Act, section 167.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposal may be submitted to Joyce Kershner, Director of Licensure, Texas Board of Chiropractic Examiners, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305-6709.

TRD-200101818
Gary K. Cain, Ed. D.
Executive Director
Texas Board of Chiropractic Examiners
Filed: March 28, 2001

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Texas Department of Health

Title 25, Part 1

The Texas Department of Health (department) will review and consider for readoption, revision or repeal Title 25, Texas Administrative Code, Part 1, Chapter 36. Medicaid Program Appeals Procedures, Subchapter A. General, §§36.1, 36.2; and Subchapter C. Recipient Notice and Fair Hearing, §§36.21, 36.22, 36.23.

This review is in accordance with the requirements of the Texas Government Code, §2001.039, the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999.

An assessment will be made by the department as to whether the reasons for adopting or readopting these rules continue to exist. This assessment will be continued during the rule review process. Each rule will be reviewed to determine whether it is obsolete, whether the rule reflects current legal and policy considerations, and whether the rule reflects current procedures of the department. The review of all rules must be completed by August 31, 2003.

Comments on the review may be submitted in writing within 30 days following the publication of this notice in the *Texas Register* to Linda Wiegman, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. Any proposed changes to

these rules as a result of the review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional 30 day public comment period prior to final adoption or repeal by the department.

TRD-200101807
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 28, 2001

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Texas Savings and Loan Department

Title 7, Part 4

The Finance Commission of Texas files this notice of intention to review Texas Administrative Code, Title 7, Chapter 61 (§§61.1-61.3), relating to Hearings pertaining to Savings and Loan Associations, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167. The commission will accept comments for 20 days following publication of this notice in the *Texas Register* as to whether reasons for adopting this chapter continue to exist. Final consideration of the rules review of this chapter is scheduled for the Commission's meeting on May 25, 2001.

The Texas Savings and Loan Department which administers these rules, believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78795, or by e-mail to pledger@TSLD.state.tx.us. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 20 day public comment period prior to final adoption or repeal by the commission.

TRD-200101794
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: March 28, 2001

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The Finance Commission of Texas files this notice of intention to review Texas Administrative Code, Title 7, Chapter 63 (§§63.1-63.15), relating to Fees and Charges pertaining to Savings and Loan Associations, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167. The commission will accept comments for 20 days following publication of this notice in the *Texas Register* as to whether reasons for adopting this chapter continue to exist. Final consideration of the rules review of this chapter is scheduled for the Commission's meeting on May 25, 2001.

The Texas Savings and Loan Department which administers these rules, believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78795, or by e-mail to pledger@TSLD.state.tx.us. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 20 day public comment period prior to final adoption or repeal by the commission.

TRD-200101793
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: March 28, 2001

♦ ♦ ♦

The Finance Commission of Texas files this notice of intention to review Texas Administrative Code, Title 7, Chapter 64 (§§64.1-64.9), relating to Books, Records, Accounting Practices, Financial Statements, Reserves, and Net Worth pertaining to Savings and Loan Associations, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167. The commission will accept comments for 20 days following publication of this notice in the *Texas Register* as to whether reasons for adopting this chapter continue to exist. Final consideration of the rules review of this chapter is scheduled for the Commission's meeting on May 25, 2001.

The Texas Savings and Loan Department which administers these rules, believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78795, or by e-mail to pledger@TSLD.state.tx.us. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 20 day public comment period prior to final adoption or repeal by the commission.

TRD-200101795
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: March 28, 2001

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The Finance Commission of Texas files this notice of intention to review Texas Administrative Code, Title 7, Chapter 79 (§§79.1-79.121), relating to Miscellaneous Matters (Books, Records, Accounting Practices, Financial Statements, and Reserves; Corporate Activities; Capital and Capital Obligations; Holding Companies; Foreign Savings Banks; Hearings; Fees and Charges; and Statements of Policy) pertaining to Savings Banks, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167. The commission will accept comments for 20 days following publication of this notice in the *Texas Register* as to whether reasons for adopting this chapter continue to exist. Final consideration of the rules review of this chapter is scheduled for the Commission's meeting on May 25, 2001.

The Texas Savings and Loan Department which administers these rules, believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78795, or by e-mail to pledger@TSLD.state.tx.us. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 20 day public comment period prior to final adoption or repeal by the commission.

TRD-200101796
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: March 28, 2001

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Telecommunications Infrastructure Fund Board

Title 1, Part 18

The Telecommunications Infrastructure Fund Board (TIFB) proposes to review the following sections from Chapter 471, concerning Operating Rules of the Telecommunications Infrastructure Fund Board, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167:

471.1. General Powers.

471.3. Number, Terms of Office and Qualifications.

471.5. Chairman.

471.7. Vice-Chairman.

471.9. Compensation of Board Members.

471.11. Place of TIF Board Meetings.

471.13. Regular Meetings.

471.15. Emergency Meetings.

471.17. Executive Sessions.

471.19. Quorum, Manner of Acting and Adjournment.

471.30. Finance and Audit Committee.

471.31. Other Committees.

471.32. Advisory Committees.

471.33. Committee Procedure.

471.50. Contracts and Appointments of Agents.

471.60. Rules Governing Acceptance of Gifts, Grants and Donations.

471.70. Standard of Conduct and Conflict of Interest Provisions.

471.80. Private Interest in Measure or Decision.

471.90. Fiscal Year.

471.91. Books and Records.

471.92. Effective Date of Rules.

471.100. Amendments to the Rules.

As a result of the rule review process, the TIFB is contemporaneously proposing the repeal of §§471.3, 471.5, 471.7, 471.9, 471.11, 471.13, 471.15, 471.17, 471.19, 471.30-471.33, 471.50, 471.60, 471.70, 471.80, 471.90-471.92, 471.100 and new §§471.3, 471.11, 471.13 and 471.51, concerning Operating Rules of the Telecommunications Infrastructure Fund Board. The repeal and replacement is published elsewhere in this issue of the *Texas Register*.

The TIFB previously published the proposed rule review of Chapter 471 in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11966). The rule review is re-proposed because the repeal and replacement of chapter 471 has been withdrawn and re-proposed elsewhere in this issue of the *Texas Register*.

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

TRD-200101774
Robert J. "Sam" Tessen
Executive Director
Telecommunications Infrastructure Fund Board
Filed: March 26, 2001

♦ ♦ ♦

Adopted Rule Reviews

Finance Commission of Texas

Title 7, Part 1

The Finance Commission of Texas (the "commission") has completed the review of Texas Administrative Code, Title 7, Chapter 9, consisting of §§9.1 - 9.84, regarding Rules of Procedure for Contested Case Hearings, Appeals and Rulemakings.

Notice of the review was published in the January 19, 2001, issue of the *Texas Register* (26 TexReg 781). No comments were received with respect to these rules. The commission believes that the reasons for adopting these rules continue to exist. The Texas Department of Banking, the Savings and Loan Commissioner and the Consumer Credit Commissioner, which agencies are also subject to these rules, concur in the commission's determination.

The commission readopts these sections, pursuant to the requirements of Government Code, §2001.039, and finds that the reason for adopting these rules continues to exist.

TRD-200101675
Everette D. Jobe
Certifying Official
Finance Commission of Texas
Filed: March 23, 2001

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Texas State Board of Examiners of Marriage and Family Therapists

Title 22, Part 35

The Texas State Board of Examiners of Marriage and Family Therapists (board) readopts Title 22, Texas Administrative Code, Part 35, Chapter 801, Licensure and Regulation of Marriage and Family Therapists.

The board redopts the repeal of §§801.20, 801.92 - 801.95, and amendments to §§801.1, 801.2, 801.11 - 801.19, 801.41 - 801.45, 801.47 - 801.49, 801.51 - 801.53, 801.72, 801.73, 801.91, 801.112 - 801.114, 801.142 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.232 - 801.237, 801.262 - 801.268, 801.291 - 801.296, 801.298, 801.299, 801.331, 801.332, 801.351, 801.361, 801.362, 801.364, 801.365, 801.368, and 801.369 and new §801.92 and §801.93 concerning the licensure and regulation of marriage and family therapists published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11843).

Sections 801.2, 801.42, 801.144, 801.173, 801.174, and 801.266 are adopted with changes to the proposed text as published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11843). The repeal of §801.20 and §§801.92 - 801.95, amendments to §§801.1, 801.11 - 801.19, 801.41, 801.43 - 801.45, 801.47 - 801.49, 801.51 - 801.53, 801.72, 801.73, 801.91, 801.112 - 801.114, 801.142, 801.143, 801.171, 801.172, 801.201 - 801.204, 801.232 - 801.237, 801.262 - 801.265, 801.267, 801.268, 801.291 - 801.296, 801.298, 801.299, 801.331, 801.332, 801.351, 801.361, 801.362, 801.364, 801.365, 801.368, and 801.369, and new §801.92 and §801.93 are adopted without changes to the proposed text as published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11843).

The board also redopts §§801.46, 801.50, 801.54, 801.71, 801.111, 801.141, 801.231, 801.261, 801.297, 801.300, 801.363, 801.366, and 801.367 that were proposed for readoption without changes in the proposed preamble published in the December 1, 2000, issue of the *Texas*

Register (25 TexReg 11843) and are readopted without changes because no needed revisions were identified during the review. The effective date of §§801.46, 801.50, 801.54, 801.71, 801.111, 801.141, 801.231, 801.261, 801.297, 801.300, 801.363, 801.366, and 801.367 is April 11, 2001.

A Notice of Intention to Review for §§801.1, 801.2, 801.11 - 801.20, 801.41 - 801.54, 801.71 - 801.73, 801.91 - 801.95, 801.111 - 801.114, 801.141 - 801.144, 801.171 - 801.174, 801.201 - 801.204, 801.231 - 801.237, 801.261 - 801.268, 801.291 - 801.300, 801.331, 801.332, 801.351, and 801.361 - 801.369 was published in the *Texas Register* on September 17, 1999 (24 TexReg 7774). No comments were received as a result of the publication of the notice. These sections has been reviewed in accordance with the requirements that each state agency review and consider for readoption each rule adopted by that agency, General Appropriations Act, 75th Legislature, (1997), Article IX, §167; the General Appropriations Act, 76th Legislature, (1999), Article IX, §9-10.13; and Government Code §2001.039. The board has determined that reasons for readopting the sections continue to exist, however §801.20 and §§801.92 - 801.95 were repealed, and §801.92 and §801.93 were added as new rules. No comments were received as a result of the publication of the Notice of Intention to Review.

The adopted preamble and rules are being published in this same issue under the Adopted Rules Section.

TRD-200101664
Marvarene Oliver, Ed.D.
Chairman
Texas State Board of Examiners of Marriage and Family Therapists
Filed: March 22, 2001

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Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) adopts the rules review and readopts Chapter 330, Municipal Solid Waste (Subchapters A-L), in accordance with Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The proposed notice of intention to review was published in the December 1, 2000 issue of the *Texas Register* (25 TexReg 11965). Subchapters M-V, Y, and Z of Chapter 330 were previously reviewed and readopted by the commission on August 11, 1999, under Rule Log Number 1998-056-330-WS. The commission does not currently have a Subchapter W or X in Chapter 330.

CHAPTER SUMMARY

Chapter 330 implements state and federal statutory requirements and federal regulatory requirements for the management of municipal solid waste so as to protect public health and the environment. Subchapter A concerns General Information; Subchapter B concerns Municipal Solid Waste Storage; Subchapter C concerns Municipal Solid Waste Collection and Transportation; Subchapter D concerns Classification of Municipal Solid Waste Facilities; Subchapter E concerns Permit Procedures; Subchapter F concerns Operational Standards for Solid Waste Land Disposal Sites; Subchapter G concerns Operational Standards for Solid Waste Processing and Experimental Sites; Subchapter H concerns Groundwater Protection Design and Operation; Subchapter I concerns Groundwater Monitoring and Corrective Action; Subchapter J concerns Closure and Post-Closure; Subchapter K concerns Closure, Post-Closure, and Corrective Action; and Subchapter L concerns Location Restrictions.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission determined that the reasons for the rules in Chapter 330 continue to exist. The rules are needed to comply with state and federal statutory requirements and federal regulatory requirements. The state Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361, assigns responsibility to the commission for the management of municipal solid waste and authorizes the commission to adopt rules consistent with the Act and establish minimum standards of operation for the management and control of solid waste under the Act. The federal Solid Waste Disposal Act, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), directed the states to implement permit programs or other systems of prior approval to assure that each solid waste management facility which may receive hazardous household waste or conditionally-exempt hazardous waste from small quantity generators is protective of human health and the environment, incorporating criteria to be developed by the United States Environmental Protection Agency (EPA). Additionally, HSWA directed the EPA to evaluate the state permit programs to determine if they had adequately implemented the EPA criteria, and in any state which did not adopt an adequate program the EPA was to use its statutory authority to enforce the criteria. The EPA developed the criteria and promulgated them in 40 Code of Federal Regulations Part 258, Criteria for Municipal Solid Waste Landfills, addressing a variety of standards including location restrictions, groundwater monitoring, corrective action requirements, and financial assurance. These requirements were incorporated into Chapter 330, which was evaluated by the EPA and found to be adequate. Therefore, a need continues to exist to maintain a state regulatory program that meets the state statutory requirements and the federal adequacy standards.

The commission's review of Chapter 330 has also revealed the need for a number of changes, which the commission intends to propose in another rulemaking in the future.

PUBLIC COMMENT

The public comment period closed on January 2, 2001. No comments on whether or not the reasons for the rules continue to exist were received.

TRD-200101674
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 23, 2001

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Texas Department of Protective and Regulatory Services

Title 40, Part 19

The Texas Department of Protective and Regulatory Services (TDPRS) adopts the review of Title 40 Texas Administrative Code Chapter 710, Protection of Clients and Staff. The proposed notice of review was published in the February 9, 2001, issue of the *Texas Register* (26 TexReg 1375). This review is pursuant to the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167. No comments were received regarding the readoption of this chapter.

Chapter 710 satisfies the requirements of the Human Resources Code, §255(a) and (c), and the Texas Family Code, §261.404, which require

TDPRS and the Texas Department of Mental Health and Mental Retardation (TDMHMR) to develop joint rules to facilitate investigations in TDMHMR facilities and related programs. The board has reviewed Chapter 710 and determined that the initial reasons for adoption of this chapter continue to exist. However, as part of the rule review process, TDPRS is repealing Chapter 710, and adopting new rules in Chapter 711, Investigations in TDMHMR Facilities and Related Programs. The new rules add information about home and community-based services investigations, and are written using plain language to make them easier to understand. The adopted repeals and new sections may be found in the Adopted Rules section of this issue of the *Texas Register*. This concludes the board's review of 40 TAC Chapter 710, as required by the Texas Government Code, §2001.039, and the General Appropriations Act of 1997, Article IX, §167.

TRD-200101726
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Filed: March 23, 2001

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IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, 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.

Texas Commission for the Blind

Request for Proposal, Professional Auditing Services

The Texas Commission for the Blind, herein referred to as the Commission, is currently seeking a Certified Public Accountant (CPA) or CPA firm to perform financial auditing services. These services are to be provided in regards to the Business Enterprises of Texas (BET) Program, herein referred to as the BET Program. The BET Program provides employment opportunities for blind persons in food service businesses. The laws and rules that govern the BET Program are the Randolph-Sheppard Act, 20 U.S.C. 107-107F; Texas Human Resources Code, Chapter 94; and Texas Administrative Code, Chapter 167.

This contract will be for conducting audits of vending service contracts that the Commission has with companies in areas around the state. These contractors service vending machines in locations not managed by a blind licensed manager. The locations served under each contract are in the same geographic area of the state.

The audit period for review of records is January 1, 2000, through December 31, 2000. The Commission anticipates awarding a contract approximately May 30, 2001, and has targeted completion of this contract by August 31, 2001.

Objectives: The audits will address the following objectives: --To gain an understanding of the vending services contractor's operations, as it relates to the Commission's contract with the vendor. --To verify that the information reported by the vending services contractor to the Commission (e.g., sales, commissions, meter readings) is accurate and supported by vendor records. --To verify that all commissions (monies) due the Commission from the vending services contractor are paid. --To verify that the number and type of vending machines for each facility covered by the Commission's contract with the vendor agree with Commission records. --To verify that sales taxes applicable to vending operations pertaining to the Commission's contract with the vendor have been paid in accordance with State Comptroller requirements. -- To determine that the vending services contractor's policies, procedures, and practices are adequate for ensuring vendor compliance with the Commission's contract and are being followed.

The vending service contracts selected for audit will be based on a risk assessment conducted by Commission staff. Commission staff also will develop the audit program to be used by the selected CPA firm in the conduct of the audits.

The Commission's Internal Audit Director will have primary oversight for the performance of this contract for financial auditing services. The work products required for the audit of each vending services contract are a set of work papers and a written statement of findings. Payment for services will be made for each facility audited upon review and acceptance of work products by the Internal Audit Director.

To prepare a proposal for consideration by the Commission, information must be obtained about the vending services contracts selected for audit (e.g., geographic area serviced, number of locations and machines, average sales per location), and the audit program to be used. Contact Ms. Tonya Netzley, Internal Audit Director, via telephone (512) 377-0535 or email tonya.netzley@tcb.state.tx.us to obtain this information.

Proposal Content: If, after having received and reviewed the preceding information, you are interested in making a proposal to perform this contract, you may provide the Commission with your qualifications, demonstrated competencies, and references related to the provision of these services. All proposals must include the dates your proposed staff will be available to begin work on this contract, the number of hours per month each proposed staff member will be available to work on this project, and you must identify the proposed Project Manager. Qualifications must include staff certification and education level, and peer review results. Demonstrated competencies include firm and staff auditing and/or accounting experience in food services, vending and/or contract compliance. Each proposal must provide the names of three references that describe work in these areas and identified contact persons.

In addition, the application must include, in a sealed envelope, your fee proposal for providing these services. The fee proposal should include all anticipated operational costs, including staff salaries and travel. Travel expenses during the contract period shall be reimbursed in accordance with State of Texas Travel Regulations and the Official Mileage Guide as they apply to state employees.

Selection under this RFP will be made based on qualifications, demonstrated competencies, and references described in the proposal, in accordance with a fair and reasonable fee proposal.

Proposal Deadline and Contact Persons: All proposals must be received either by mail or hand-delivered no later than May 7, 2001, at 5:00 p.m. to Ms. Peggy Enderlin, Purchasing Supervisor, Texas Commission for the Blind, 4800 N. Lamar Blvd, Suite 360, Austin, TX 78756. The proposal should be delivered in a sealed envelope with the following number referenced on the **outside** of the envelope, 318-1-43826-1. Late proposals will not be considered.

Questions or inquiries about the scope of this RFP should be directed to Ms. Netzley (telephone number and email are provided in the paragraph immediately preceding the section entitle "Proposal Content") no later than April 18, 2001, 5:00 P.M.

Note: Should additional resources become available during the awarded contract period, the Commission may consider negotiating for conducting additional audits of vending services contracts similar to those covered in this RFP.

TRD-200101751
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Filed: March 23, 2001

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Coastal Bend Workforce Development Board

Public Notice to Comment on Workforce Development Modified Integrated Plan for Years 2001-2004

The Coastal Bend Workforce Development Board (hereinafter referred to as the "Board") is hereby publishing a Modified Integrated Plan for the 12-county region. The plan is due to the Texas Workforce Commission on April 27, 2001. The plan will include the following information: 1) a description of the intended service delivery system for the region, 2) the strategic and operational goals and objectives, 3) the activities and services to be provided to employers, job seekers, 4) the integration of services at the Workforce Centers and 5) the Targeted Occupations List. The Modified Integrated Plan includes the following programs: Workforce Investment Act, Temporary Assistance to Needy Families (Choices), Food Stamp Employment and Training, Welfare to Work, and Child Care services. The Modified Integrated Plan will include services and activities to the following counties: Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Nueces (including the City of Corpus Christi), Refugio, and San Patricio.

The general public, local entities, and interested parties are invited to comment on the Plan. To facilitate your comments, the Plan will be available for a thirty day reviewing comment period on the Board's website at www.cbwdb.com beginning March 26, 2001. Please send your comments regarding the Plan by replying to above website, or by U.S. mail to the attention of: Robert Ramirez, Adult Program Director, Coastal Bend Workforce Development Board, 4444 Corona, Suite 215, Corpus Christi, Texas 78411. For those individuals that do not have access to a computer and/or the internet system, a copy of the document will be made available at the locations shown below. We encourage you to submit your comments.

Coastal Bend Workforce Board Office:

4444 Corona, Suite 215 Corpus Christi, Texas 78411

Workforce Centers:

Corpus Christi: 1616 Martin Luther King Drive 78401 or 520 N. Staples Street 78401

Kingsville: 1417 E. Corral 78363

Alice: 1409 E. Main Street, Room 21 78332

Beeville: 309 N. St. Mary's Street 78102

Sinton: 1113 E. Sinton Street 78387

Community Council of South West Texas:

1616 Martin Luther King Drive, Corpus Christi, Texas 78401

The Coastal Bend Workforce Development Board is an Equal Opportunity Employer/Program.

Auxiliary aids and services are available upon request to individuals with disabilities. Telephone access is available via TDD 1-800-RELAY TX. Voice 1-800-RELAY VV.

TRD-200101784
Allan F. Meriwether
President and CEO
Coastal Bend Workforce Development Board
Filed: March 27, 2001

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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 16, 2001, through March 8, 2001. The public comment period for these projects will close at 5:00 p.m. on April 9, 2001.

FEDERAL AGENCY ACTIONS

Applicant: Vintage Petroleum, Inc.; Location: The project site is located in State Tract 9-12A in Trinity Bay, Chambers County, Texas. The site can be located on the U.S.G.S. quadrangle map entitled Umbrella Point, Texas. The approximate UTM Coordinates: Zone 15; Easting: 330000; Northing: 3286000. CCC Project No.: 01-0081-F1; Description of Proposed Action: The applicant requests authorization to install a 41/2-inch diameter O.D. pipeline from their No. 2 Well located in State Tract 9-12A to the Vintage Petroleum, Inc., No. 1 Well in State Tract 9-12A. The proposed pipeline will be installed a minimum of 3 feet below the bay bottom by jetting, disking or plowing, depending on bottom conditions. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Applicant: Cabot Oil & Gas Corporation; Location: The project site is located in Aransas Bay, in State Tract 228, in Aransas County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Estes, Texas. Approximate UTM Coordinates: Zone 14; Easting 692575; Northing: 3093313. CCC Project No.: 01-0085-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities for Well Number 1. The project includes installation of a typical marine barge and

keyway, a production platform with attendant facilities, and flowlines between well and production platforms. The approximate water depth of Aransas Bay at the proposed well location is 10 feet mean low tide. All work would be performed within a 500-foot radius of the proposed well coordinates (X=2,470,523 and Y=833,616). Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Applicant: Hallwood Petroleum, Inc.; Location: The project site is located off State Highway 562, northeast of Smith Point, near Lake Surprise, in the South Mayes Gas Field, Chambers County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Lake Stephenson, Texas. Approximate UTM Coordinates: Zone 15; Easting 334400; Northing: 3270300. CCC Project No.: 01-0086-F1; Description of Proposed Action: The applicant proposes to construct a 300- by 300-foot drill pad for oil and gas exploration and production. In addition, the applicant requests authorization to build a 100-foot-long road to gain access to the drill site. A total of 2.1 acres of wetlands will be impacted by the proposed activities. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

Applicant: ExxonMobil Pipeline Company; Location: The project is located in Old Cow Bayou, south of the Orange County Airport, between the Bayer and Printpack Plants, in Orange County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Orangefield, Texas. Approximate UTM Coordinates: Zone 15; Easting 426000; Northing: 3322000. CCC Project No.: 01-0087-F1; Description of Proposed Action: The applicant requests authorization to place sandbags on top of a 90-linear-foot section of an existing 4-inch diameter butadiene pipeline. The sandbags are necessary to protect a segment of the pipeline that has become exposed in the bayou. Sixty-pound bags containing a 1-to-3 mixture of cement and sand in a burlap sack will be placed over the exposed pipe. The sandbags will be stacked end-to-end, with two bags on each side of the pipe, three bags on top of the first, followed by two bags, and one bag capping the stack. The height of the stack will be approximately 16 feet above the natural bottom of the channel. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act

Applicant: IBC Pipeline Operating, L.P.; Location: The project site is located on State Tract 397 and State Tract 396. The project can be located on the U.S.G.S. quadrangle map entitled Port Ingleside, Texas. Approximate UTM Coordinates: Zone 14; Easting 680302; Northing: 3076619. CCC Project No.: 01-0088-F1 Description of Proposed Action: The applicant proposes to install a 6-inch-diameter pipeline to transport petroleum products from an existing platform in State Tract 397 to a riser in State Tract 396. The 3,320-foot-long pipeline would be buried a minimum of 3 feet by disking, plowing or jetting. An oyster and seagrass survey of the proposed pipeline route has been performed, and no oysters or seagrasses were found along the pipeline route. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act

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-200101792
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: March 27, 2001

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Comptroller of Public Accounts

Notice of Contract Award

Notice of Award: Pursuant to Chapter 2254, Chapter B, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award.

The notice of request for proposals (RFP #119a) was published in the January 19, 2001, issue of the *Texas Register* at 26 Tex Reg 790.

The consultant will assist Comptroller in conducting a management and performance review of the Robstown Independent School District.

The contract was awarded to: Trace Consulting Services, Inc., 17460 IH-35N, Suite 160-308, Schertz, Texas 78154. The total amount of the contract is not to exceed $124,750.00. The project will culminate in a final report due no later than July 9, 2001.

The term of the contract is March 27, 2001 through August 31, 2001.

TRD-200101804
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: March 28, 2001

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Notice of Public Hearing on Insurance Tax Rule 3.831

The Office of the Comptroller of Public Accounts will hold a public hearing regarding the proposed amendment to Insurance Tax §3.831, on Tuesday, April 10, 2001, at 10:00 a.m. in Room 114, located on the 1st floor of the LBJ State Office Building, 111 East 17th Street, Austin, Texas 78701. The proposed amendment was published in the November 3, 2000, issue of the *Texas Register*.

The purpose of the hearing is to receive public comments from interested persons, pursuant to Government Code, §2001.029. Questions concerning the public hearing or this notice should be referred to Martin Cherry, General Counsel Division, (512) 463-4606. E-mail address: Martin.Cherry@cpa.state.tx.us. Fax number: (512) 475-0720. Hearing and speech-impaired individuals with text telephones (TTY) may contact the agency at (512) 463-4621.

TRD-200101811
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Filed: March 28, 2001

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in 303.003, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 03/26/01 - 04/01/01 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 03/26/01 - 04/01/01 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 04/01/01 - 04/30/01 is 10% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 04/01/01 - 04/30/01 is 10% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200101628
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 21, 2001

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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, and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 04/02/01 - 04/08/01 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 04/02/01 - 04/08/01 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005[3] for the period of 04/01/01 - 04/30/01 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 for the period of 04/01/01 - 04/30/01 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

TRD-200101791
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 27, 2001

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Golden Crescent Workforce Development Board

Public Notice

The Golden Crescent Workforce Development Board will release it's Request for Applications for providers of summer youth activities on March 30, 2001. The deadline for response to this procurement is 5 p.m., April 30, 2001. A complete set of specifications may be obtained at 120 South Main #501, Victoria, Texas, Phone: (361) 576-5872, Fax: 573-0225, or email: sandy.heiermann@twc.state.tx.us.

TRD-200101798
Isabel Simmons
Administrative Clerk
Golden Crescent Workforce Development Board
Filed: March 28, 2001

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Texas Department of Housing and Community Affairs

Announcement of the Public Comment Period for the 2001 State of Texas Consolidated Plan Annual Performance Report - Reporting on Program Year 2000 - *Draft For Public Comment*

The Texas Department of Housing and Community Affairs ("the Department") announces the opening of a fifteen day public comment period for the *State of Texas 2001 Consolidated Plan Annual Performance Report - Reporting on Program Year 2000 - Draft for Public Comment* as required by the U.S. Department of Housing and Urban Development (HUD) as part of the overall requirements governing the State's consolidated planning process. The *State of Texas 2001 Consolidated Plan Annual Performance Report - Reporting on Program Year 2000 - Draft for Public Comment* is submitted in compliance with 24 CFR 91.520 Consolidated Plan Submissions for Community Planning and Development Programs made effective on January 5, 1995. The fifteen-day public comment period begins April 11, 2001, and continues until 5:00 p.m., April 25, 2001.

The *State of Texas 2001 Consolidated Plan Annual Performance Report - Reporting on Program Year 2000 - Draft for Public Comment* gives the Department an opportunity to evaluate its accomplishments during the past program year for the Community Development Block Grant (CDBG) program, the HOME Investment Partnership program, the Emergency Shelter Grant (ESG) program, and the Housing Opportunities for Persons with AIDS (HOPWA) program. The Plan includes the following: a summary of resources and programmatic accomplishments for each of the four programs covered in the Consolidated Plan; a series of narrative statements about various aspects of the Department's performance over the past program year; and a qualitative analysis of the Department's actions and experiences. The Department also addresses its success in meeting each of the goals and objectives set forth in the *1996 State of Texas Consolidated Plan* and in the subsequent State of Texas One Year Action Plans.

Beginning April 11, 2001, the *State of Texas 2001 Consolidated Plan Annual Performance Report - Reporting on Program Year 2000 - Draft for Public Comment* will be available on the Texas Department of Housing and Community Affairs's website at www.tdhca.state.tx.us. A hard copy can be requested by contacting the Housing Resource Center at P.O. Box 13941, Austin, TX 78711-3941, or (512) 475-3976.

Copies will be available for review after April 11, 2001, at the following locations: **ABILENE** Abilene Public Library, 915/677-2474; **ALPINE** Sul Ross State University, 915/837-8124; **AMARILLO** Amarillo Public Library, 806/378-3054; **ARLINGTON** University of Texas at Arlington, 817/273-3000; **AUSTIN** Legislative Reference Library, 512/463-1252, Texas State Library, 512/463-5455, University of Texas at Austin, 512/495-4515, University of Texas at Austin Tarlton Law Library, 512/471-7726; **BEAUMONT** Beaumont Public Library, 409/838-6606, Lamar University, 409/880-8118; **BROWNSVILLE** University of Texas at Brownsville, 210/544-8220; **CANYON** West Texas A&M University, 806/651-2205; **COLLEGE STATION** Texas A&M University, 409/845-8111; **COMMERCE** Texas A&M University - Commerce, 903/886-5716; **CORPUS CHRISTI** Corpus Christi Public Library, 361/880-7000; Texas A&M University - Corpus Christi, 361/994-2623; **DALLAS**

Dallas Public Library, 214/670-1400, Southern Methodist University, 214-768-2331; **DENTON** Texas Woman's University, 940/898-2665, University of North Texas, 940/565-2870; **EDINBURG** University of Texas - Pan American, 956/381-3306; **EL PASO** El Paso Public Library, 915/543-5413, University of Texas at El Paso, 915/747-5683; **FORT WORTH** Fort Worth Public Library, 817/871-7706, Texas Christian University, 817/921-7669; **HOUSTON** Houston Public Library, 713/247-2700, Rice University, 713/527-4022, Texas Southern University, 713/527-7147, University of Houston, 713/743-9800, University of Houston - Clear Lake, 281/283-3930; **HUNTSVILLE** Sam Houston State University, 409/294-1613; **KINGSVILLE** Texas A&M University - Kingsville, 361/595-3416; **LAREDO** Texas A&M International University, 956/326-2400; **LUBBOCK** Texas Tech University, 806-742-2261; **NACOGDOCHES** Stephen F. Austin State University, 409/468-4101; **ODESSA** Ector County Library , 915/332-6502, University of Texas of the Permian Basin, 915/552-2371; **PRAIRIE VIEW** Prairie View A&M University, 409/857-2012; **RICHARDSON** University of Texas at Dallas, 972/883-2950; **SAN ANGELO** Angelo State University, 915/942-2222; **SAN ANTONIO** Saint Mary's University, 210/436-3441, San Antonio Central Library, 210/207-2500, Trinity University, 210/736-8121, University of Texas at San Antonio, 210/691-4570; **SAN MARCOS** Southwest Texas State University, 512/245-2133; **STEPHENVILLE** Tarleton State University, 817/968-9246; **TYLER** University of Texas at Tyler, 903/566-7340; **VICTORIA** University of Houston at Victoria, 361/572-6421: **WACO** Baylor University, 254/710-1268; **WICHITA FALLS** Midwestern State University, 940/689-4165 **OUT-OF-STATE**Library of Congress, 202/707-5243.

Written comment is encouraged and should be sent to the Texas Department of Housing and Community Affairs, Office of Strategic Planning/Housing Resource Center, P.O. Box 13941, Austin, TX 78711-3941. For more information or to order copies of the *State of Texas 2001 Consolidated Plan Annual Performance Report - Reporting on Program Year 2000 - Draft for Public Comment* please contact the Housing Resource Center at (512) 475-3976 or email at clandry@tdhca.state.tx.us.

TRD-200101808
Daisy Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 28, 2001

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Public Hearing Schedule for 2001 Applications

Low Income Housing Tax Credit Program

The Texas Department of Housing and Community Affairs ("the Department") programs were created to provide decent, safe and sanitary housing opportunities for low and very low income Texans. The Department, under the Low Income Housing Tax Credit (LIHTC) Program, aids in building affordable housing through the issuance of federal tax credits used to fund new construction and rehabilitation of multifamily residential developments. Owner and investors in qualified affordable multifamily residential developments can use the tax credits as a dollar-for-dollar reduction of federal income tax liability. The value associated with the tax credits allow units in the developments to be leased to qualified families at below-market rate rents.

The Department will hold public hearings to receive comments on the 2001 LIHTC applications at the following times and locations:

SAN ANTONIO, Saturday, May 12

City Council Chambers

103 Main Plaza

10:00 a.m.

AUSTIN, Tuesday May, 15

TDHCA Headquarters

Board Room, 4th Flr.

507 Sabine

1:00 p.m.

HOUSTON, Saturday, May 19

Original City Council Chambers

City Hall, 2nd Flr.

901 Bagby

10:00 a.m.

NACOGDOCHES, Wednesday, May 30

City Commission Chambers

202 East Pilar Street, Room 119

6:00 p.m.

DALLAS, Saturday, June 2

City Council Chambers

1500 Marilla Street

10:00 a.m.

LAREDO, Tuesday, June 5

Laredo Main Library

1120 E. Calton Rd.

6:00 p.m.

BIG SPRING, Saturday, June 9

City Council Chambers

307 East 4th Street

10:00 a.m.

Written comments are also encouraged. Such comments should be addressed to:

Cherno M. Njie, LIHTC Program Manager

Texas Department of Housing and Community Affairs

Post Office Box 13941

Austin, Texas 78711-3941; or

via fax at 512.476.0438;or

via e-mail at bboston@tdhca.state.tx.us.

The determination of which applications shall receive an award of tax credits will be made at the Texas Department of Housing and Community Affairs' Board Meeting currently scheduled for July 18, 2001.

For additional information you may contact the Low Income Housing Tax Credit Program at 512.475.3340 or visit the program's web site at www.tdhca.state.tx.us/lihtc.htm

Individuals who require auxiliary aids or services for these meetings 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-200101806
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 28, 2001

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Request for Proposals to Provide Appraisal Review Services

I. PURPOSE OF THE REQUEST

The Texas Department of Housing and Community Affairs (the Department or TDHCA) is requesting proposals from qualified appraisal firms (the firm) to provide occasional review services relating to various real estate transactions in Texas, which are subject to underwriting by TDHCA. The Department's Real Estate Market Analysis and Appraisal Policy provides more information on the review process and required qualifications. This policy may be accessed through the TDHCA website at

http://www.tdhca.state.tx.us/underwrite.html

The Department reserves the right to choose from a list of approved firms for the review of any particular appraisal report with any combination or number of participants and/or from respondents prior to the response deadline as needed.

II. RESPONSE TIME FRAME AND OTHER INFORMATION

Response Due: May 31, 2001, 4:30 p.m. CST

It is the express policy of the Department that parties receiving this request refrain from initiating any direct contact or communication with members of the Board of Directors with regard to selection of firms relative to this Request for Proposal while the selection process is occurring. Any violation of this policy will be considered a basis for disqualification.

Also, releasing this Request for Proposals, TDHCA shall not be obligated to proceed with any action on the Request for Proposals and may decide it is in the Department's best interest to refrain from pursuing any selection process. TDHCA reserves the right to negotiate individual elements of any proposal.

Two copies of the proposal should be delivered to the following address:

Texas Department of Housing and Community Affairs

Attn: Tom Gouris, Director of Credit Underwriting

507 Sabine Street, Suite 400

PO Box 13941

Austin, Texas 78711-3941

(512) 475-1470

III. RESPONSE FORMAT

A. Each item in Section IV of this Request for Proposals should be specifically addressed, or an explanation should be provided as to why no response is given.

B. Identify the item to be addressed in the introduction to each response.

C. Please limit your response to relevant material and your proposal to 25 pages in length; additional information may be submitted in the form of an attachment or appendix.

IV. PROPOSAL CONTENT

A. General Information

Provide information regarding the organization and structure of the firm including, but not limited to:

1. Number of offices located in Texas

2. Location of office(s) to serve TDHCA and brief description of support staff

3. Number of registered representatives located in Texas

4. List of housing clients currently served by or proposed to be served by the firm

5. Areas of Texas the firm is willing to serve

B. Firm

Provide information regarding the experience of the firm including, but not limited to:

1. Number of appraisals of multifamily and single family residential properties; attach a descriptive list of assignments performed since 1998

2. Number of appraisal reviews of multifamily and single family residential properties; attach a descriptive list of assignments performed since 1998

3. Description of familiarity with transactions involving federal and/or state housing programs

4. Any other unique qualifications

C. Personnel

Provide information about the professionals employed by the firm including, but not limited to:

1. Names, office location and brief resumes, including licensing and certification, of persons to be assigned to this account

2. List of housing clients served by or proposed to be served by the personnel assigned to this account

D. Services Provided

Provide a description of the services to be provided by the firm and the proposed cost to be charged for each distinct service. The services to be preformed may include, but are not limited to the following:

1. Desktop market study review only

2. Desktop appraisal review only

3. Exterior inspection of property

4. Interior inspection of subject property

5. Inspection of comparable sales and rentals

6. Review of plans, specifications, and cost breakdown

7. Appraiser interview

8. Complete reconciliation with original appraiser

V. FINANCIAL CONDITION

Provide a copy of the firm's most recent financial statement. (This should be included as an attachment or appendix and will not be considered part of the page limitation of proposals.)

VI. DEPARTMENTAL INFORMATION

Additional information regarding TDHCA may be obtained from Tom Gouris at TDHCA. All requests must be in writing and faxed to (512)

475-4420. All questions and responses will be made available to all applicants and will be subject to disclosure under the Open Records Act.

VII. OPEN RECORDS

All proposals shall be deemed, once submitted, to be the property of TDHCA and subject to the Open Records Act, Tex. Rev. Civ. Stat. Ann., Art. 6252-17a.

Proprietary information: if a firm does not desire proprietary information in the proposal to be disclosed under the Texas Open Records Act or otherwise, it is required to identify clearly (and segregate, if possible) all proprietary information in the proposal, which identification shall be submitted concurrently with the proposal. If such information is requested under the Texas Open Records Act, the firm will be notified and given the opportunity to present its position to the Texas Attorney General, who shall make the final determination. If the firm fails to clearly identify proprietary information, it agrees, by the submission of the proposal, that those sections shall be deemed non-proprietary and made available upon public request after the contract is awarded.

VIII. COST INCURRED IN RESPONDING

All costs directly or indirectly related to the preparation of a response to this RFP shall be the sole responsibility of and shall be borne by the firm.

TRD-200101797
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 28, 2001

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Houston-Galveston Area Council

Request for Information

The Houston-Galveston Area Council (H-GAC) solicits a qualified organization to provide an Interactive Voice Response (IVR) or similar system for The Worksource - Gulf Coast Careers. The Gulf Coast workforce system serves businesses and residents in the 13-county Gulf Coast region of Southwest Texas, which includes the City of Houston at its core. The contiguous counties that make up the region include Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Harris, Liberty, Matagorda, Montgomery, Walker, Waller and Wharton. Prospective proposers may obtain a copy of the Request for Information by contacting Carol Kimmick at (713) 993-4522 or by sending email to ckimmick@hgac.cog.tx.us. The Request for Information may also be downloaded at http://www.gulfcoastcareers.org. Responses are due at H-GAC offices by 12:00 noon on Friday, April 6, 2001. Late responses will not be accepted. There will be no exceptions.

TRD-200101785
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: March 27, 2001

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Texas Department of Human Services

Request for Proposal for Permanency Planning Services

The Texas Department of Human Services (DHS) announces a request for proposal (RFP) for the delivery of statewide permanency planning services to individuals under 22 years of age residing in nursing facilities in Texas.

Description of Services: The contractor(s) will develop training materials, documentation formats, informational and referral materials to be used in permanency planning, and will document information regarding children in nursing facilities and their families. The contractor will develop and periodically review permanency plans for nursing facility residents under 22 years.

Terms and/or Amount: The contract will be effective from the contract initiation date until August 31, 2001. The contract may be subject to extensions of up to three years. The contract for the approved proposal will be a cost reimbursement contract.

Selection and Evaluation: To complete the evaluation, DHS may enter into negotiations with one or more of the offerors. Additionally, DHS has the right to reject all offers submitted in response to the solicitation; DHS may, at its option, award one or more contracts; and DHS may cancel the solicitation at any time.

Evaluation criteria are established to assess which offer, if any, represents the best purchase (considering price, quantity, and quality). The factors considered in making the selection and their relative weights in the evaluation are

Technical proposal - 35 points. The potential contractor has provided a clear proposal that addresses the requirements of the RFP. The methodology described by the potential contractor to accomplish the requirements of this project is reasonable and well documented.

Qualifications, knowledge and experience of contractor - 30 points. The potential contractor has described the qualifications, experience and knowledge of its staff related to service planning for individuals with disabilities, including any experience with children residing in institutional settings. Information specific to interactions with families of children with disabilities and community-based services should also be addressed.

Proposed budget - 25 points. The potential contractor has presented separate budget and cost proposals for each task described in the RFP.

Implementation Plan - 10 points. The potential contractor has described the availability of resources for timely implementation and has presented an implementation plan that identifies timelines for the individual tasks and activities to be accomplished in this project.

To ensure the integrity of this process, proposals from committee members participating in the review of this RFP and organizations with which review members are directly or indirectly associated will not be accepted. A prospective bidder anticipating a problem or conflict that may cause disqualification from participating may contact Lily Vela at (512) 438-2489.

Offerors' Conference: A teleconference will be held on April 23, 2001, for potential offerors to receive a briefing from DHS on this RFP and to ask questions. To participate in the teleconference, potential offerors must submit a notification of intent to participate (including potential offeror's name, phone number, address, and contact person) to the agency contact person no later than Friday, April 20, 2001. Oral answers to potential offerors are not binding until released in writing. All offerors of record and potential offerors who attend the conference will receive the written responses to all questions and comments. Notification of teleconference time and access details will be communicated to interested parties who respond timely to the notification of intent to participate.

Closing Date: Proposals must be received by the department no later than 5:00 p.m. Central Daylight Time on June 14, 2001. The original proposal and four copies should be mailed to: Lily Vela, Promoting Independence Initiative, DHS, 701 W. 51st Street, Mail Code W-511,

Austin, Texas 78751, or P.O. Box 149030, Mail Code W-511, Austin, Texas 78714-9030.

Contact Person: To obtain a request for proposal packet, please write to Lily Vela, Promoting Independence Initiative, DHS, 701 W. 51st Street, Mail Code W-511, Austin, Texas 78751, or P.O. Box 149030, Mail Code W-511, Austin, Texas 78714-9030.

Historically Underutilized Businesses and Charitable Communities or religious organizations with demonstrated qualifications are encouraged to apply.

TRD-200101805
Paul Leche
General Counsel
Texas Department of Human Services
Filed: March 28, 2001

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Texas Department of Insurance

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 Synhrgy Administrative Services, Inc., a domestic third party administrator. The home office is Houston, Texas.

Application for admission to Texas of GAB Robins North America, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

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-200101625
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: March 21, 2001

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of Lifewell, Ltd., (using the assumed name of Lifewell Health Plans), a foreign third party administrator. The home office is Marietta, Georgia.

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-200101802
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: March 28, 2001

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Texas Natural Resource Conservation Commission

Correction of Error

The Texas Natural Resource Conservation Commission submitted a notice of rule review for 30 TAC Chapter 330 concerning municipal solid waste. The notice appeared in the March 23, 2001, *Texas Register* (26 TexReg 2413).

The agency inadvertently submitted the text of the proposed rule review notice instead of the adopted review notice. The notice published March 23 is the same notice published in the December 1, 2000, *Texas Register* (25 TexReg 11965). The correct adopted notice will be published in the April 6, 2001, *Texas Register*.

TRD-200101812

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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 of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **May 6, 2001**. 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 May 6, 2001**. 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: AA Foundaries, Inc.; DOCKET NUMBER: 2000-1050-IHW-E; IDENTIFIER: Solid Waste Registration (SWR) Number 39423; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: metals foundry; RULE VIOLATED: 30 TAC §335.4 and the Code, §26.121, by allegedly allowing unauthorized discharges to the ground of lead and phenol contaminated wastes; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Malcolm Ferris, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Advanced Aromatics, L.P.; DOCKET NUMBER: 2000-1023-IHW-E; IDENTIFIER: SWR Number 31239; LOCATION: Baytown, Harris County, Texas; TYPE OF FACILITY: organic chemical manufacturing; RULE VIOLATED: 30 TAC §335.69(a)(1)(B) and 40 Code of Federal Regulations (CFR) §265.192(a), by failing to perform a structural integrity assessment certified by an independent engineer; and 30 TAC §335.8 and 40 CFR

§265.111, by failing to conduct closure for less than 90 days on the hazardous waste storage tank; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Advantage Blasting and Coating, Inc.; DOCKET NUMBER: 2000-1037-AIR- E; IDENTIFIER: Air Account Number JE-0881-U; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: abrasive blasting and surface coating; RULE VIOLATED: 30 TAC §116.110(a) and the Code, §382.085 and §382.0518(a), by failing to obtain a permit or permit by rule for surface coating and dry abrasive operations; and 30 TAC §101.4 and the Code, §382.085(a), by failing to prevent the discharge of one or more air contaminants; PENALTY: $7,500; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: City of Angus; DOCKET NUMBER: 2000-0381-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) and Water Quality Permit Number 11864- 001; LOCATION: Angus, Navarro County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11864-001, Water Quality Permit Number 11864-001, Agreed Order Number 1997-0915-MWD-E, and the Code, §26.121, by failing to comply with the five-day biochemical oxygen demand (BOD5) daily average concentration limit of 20 milligrams per liter (mg/l), total suspended solids (TSS) daily average loading limit of two pounds per day, TSS individual grab limit of 65 mg/l, and dissolved oxygen minimum limit of three mg/l; PENALTY: $15,000; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(5) COMPANY: Aquasource, Inc.; DOCKET NUMBER: 1999-1532-MWD-E; IDENTIFIER: TPDES Permit Number 11193-001, Water Quality Permit Number 11193-001, and National Pollutant Discharge Elimination System (NPDES) Permit Number TX0075434; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.8, §305.125(1) and (5), TPDES Permit Number 11193-001, NPDES Permit Number TX0075434, and the Code, §26.121, by failing to provide proper maintenance and operation of the clarifier, prevent the discharge of partially treated wastewater from the aeration basin, deny wastewater significantly different from domestic wastewater from industrial discharges which interfered with treatment, and meet effluent limitations for TSS, ammonia-nitrogen, and/or biochemical oxygen demand (BOD); Design Criteria for Sewerage Systems Safety Section, by failing to operate the facility in a safe manner; and 30 TAC §319.11, TPDES Permit Number 11193-001, and the Code, §26.042, by failing to adhere to sampling and laboratory testing methods; PENALTY: $52,000; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: City of Austin; DOCKET NUMBER: 2000-0761-EAQ-E; IDENTIFIER: Edwards Aquifer Protection Program Number 95111602; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: stormwater sedimentation and filtration basin; RULE VIOLATED: 30 TAC §213.4(k) and Edwards Aquifer Protection Plan Number 95111602, by failing to comply with a provision of an Edwards Aquifer protection plan; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(7) COMPANY: Aviation Composite Technologies, Inc.; DOCKET NUMBER: 2000-1106- MLM-E; IDENTIFIER: SWR Number 85636; LOCATION: Mansfield, Tarrant County, Texas; TYPE OF FACILITY: plant which manufactures, refurbishes, and conducts repairs of metal bonded and composite aircraft parts; RULE VIOLATED: 30 TAC §335.2(b), by allowing industrial solid wastes to be stored, processed, or disposed at an unauthorized plant; 30 TAC §335.62 and 40 CFR §262.11, by failing to determine if the solid waste contaminated with sanding and paint dust was hazardous; 30 TAC §335.431(c) and 40 CFR §268.7, by failing to determine if the waste generated from the paint strip area required treatment before it could be land disposed; 30 TAC §335.69(f)(2) and (5)(B) and 40 CFR §262.34(d)(2) and (5)(ii), and §265.173, by failing to keep all waste containers closed except when adding or removing waste; post near telephones, the names and number of the emergency coordinator, location of emergency equipment, and telephone number of the fire department; 30 TAC §335.6(c), by failing to notify the TNRCC of all waste management units and generated waste streams; 30 TAC §116.110(a) and the Code, §382.085(b), by failing to either obtain a permit or satisfy the conditions for facilities permitted; and 30 TAC §115.426(1)(A) and the Code, §382.085(b), by failing to maintain paint and solvent usage records/data sheets in order; PENALTY: $11,000; ENFORCEMENT COORDINATOR: Merrilee Gerberding, (512) 239-4490; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(8) COMPANY: Basell USA, Inc.; DOCKET NUMBER: 2000-1214-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1011568; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.119(b)(1), (formerly 30 TAC §290.117(b)(1)), §290.42(d)(1), and the Code, §341.0315(c), by failing to ensure that the total treatment processes of the facility achieve at least 99.9% inactivation or removal of Giardia lamblia cysts, and at least 99.99% inactivation or removal of viruses; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Shawn Stewart, (512) 239-6684; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9) COMPANY: Mrs. Rosa Lee Eissler dba Blueberry Hill Mobile Home Estates; DOCKET NUMBER: 2000-0997-PWS-E; IDENTIFIER: PWS Number 130018; LOCATION: Beeville, Bee County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(i) and (u), by failing to adopt adequate plumbing regulations and provide a minimum pressure of 35 pounds per square inch throughout the distribution system; 30 TAC §290.44(d)(4), by failing to install meters at each service connection; 30 TAC §290.43(c)(1), (3), and (6), and (e), by failing to provide a 30-inch diameter access on all ground storage tanks, provide proper vents on all ground storage tanks, provide proper overflows on all ground storage tanks, repair a significant leak on the ground storage tank, and install intruder-resistant fences and lockable gates; and 30 TAC §290.41(c)(1)(F) and (3)(B), (J), and (N), by failing to establish sanitary control easements, provide a well casing which extends 18 inches above normal ground level, repair and/or replace the cracked sealing block, and install well flow meters; PENALTY: $1,313; ENFORCEMENT COORDINATOR: Carol McGrath, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(10) COMPANY: Browning-Ferris Industries, Inc.; DOCKET NUMBER: 2000-0914-MSW-E; IDENTIFIER: Municipal Solid Waste (MSW) Permit Number 2027; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: municipal solid waste landfill; RULE VIOLATED: 30 TAC §37.121, (formerly 30 TAC §330.9), by failing to submit current cost estimates for inflation; 30 TAC §330.113(7), by failing to maintain a copy of the current financial assurance; 30 TAC §330.111 and §330.55(b)(2) and (10), by failing

to construct and maintain a run-off management system; 30 TAC §330.113(b)(9), by failing to maintain records of permit modifications for cell construction; 30 TAC §§330.111, 330.114, and 330.134, by failing to eliminate ponded water and regrade the area and prohibit more than 12 inches of leachate on the liner; 30 TAC §330.133(f), by failing to repair erosion; and 30 TAC §330.139 and the Code, §26.121, by failing to prohibit the discharge of contaminated water into the storm water retention pond; PENALTY: $14,500; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(11) COMPANY: The City of Buffalo; DOCKET NUMBER: 2000-1253-MWD-E; IDENTIFIER: TPDES Permit Number 10022-001; LOCATION: Buffalo, Leon County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and the Code, §26.121, by failing to meet the permitted effluent limits; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Brian Lehmkuhle, (512) 239-4482; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(12) COMPANY: Camp Longhorn Capital Inc.; DOCKET NUMBER: 2001-0055-PWS-E; IDENTIFIER: PWS Number 0270053; LOCATION: Burnet, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.121(a), (formerly 30 TAC §290.106(a)(1)), by failing to provide documentation of a current bacteriological sample monitoring plan; and 30 TAC §290.46(n)(2), (formerly 30 TAC §290.46(n)), by failing to provide an accurate and up-to-date map of the distribution system; PENALTY: $144; ENFORCEMENT COORDINATOR: David Van Soest, (512) 339-0468; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(13) COMPANY: Citgo Refining & Chemicals Company, L.P.; DOCKET NUMBER: 2000- 1061-AIR-E; IDENTIFIER: Air Account Number NE-0123-B; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: petrochemical storage site; RULE VIOLATED: 30 TAC §116.116(a), Permit Number 4769B, and the Code, §382.085(b), by failing to operate storage tank numbers 9823 and 9824 in accordance with throughputs parameters as represented in its permit renewal application; 30 TAC §116.110(a), Standard Exemption 102 (1980 Version), Condition Five, and the Code, §382.085(b), by failing to verify the integrity of the primary seal on the external roof of tank number 9829; 30 TAC §122.121, §122.130, and the Code, §382.054 and §382.085(b), by failing to obtain a federal operating permit for the hydrocarbon waste storage tank number 9899; and 30 TAC §122.146(1) and (2) and the Code, §382.085(b), by failing to submit annual Title V compliance certifications; PENALTY: $20,900; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 339-1670; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(14) COMPANY: Corbet Water Supply Corporation; DOCKET NUMBER: 2000-0829-PWS-E; IDENTIFIER: PWS Number 1750013; LOCATION: Corsicana, Navarro County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(ii), (iii), and (iv), by failing to provide a total storage capacity of 200 gallons per connection, provide a service pump capacity of two gallons per minute (gpm) per connection, and provide an elevated storage capacity of 100 gallons per connection or a pressure tank capacity of 20 gallons per connection; PENALTY: $4,063; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(15) COMPANY: The City of Daisetta; DOCKET NUMBER: 2000-0971-MWD-E; IDENTIFIER: Water Quality Permit Number 10736-001 and NPDES Permit Number TX0022713; LOCATION: Daisetta, Liberty County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), (5), (9), and (11), Water Quality Permit Number 10736-001, NPDES Permit Number TX0022713, and the Code, §26.121, by failing to comply with the permitted effluent limits for BOD, TSS, dissolved oxygen, and total chlorine residual; operate and maintain the wastewater treatment facilities to ensure permit compliance; provide noncompliance notification reports; and provide the operation records; PENALTY: $8,125; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Gene Danielson; DOCKET NUMBER: 2000-0705-MWD-E; IDENTIFIER: Enforcement Identification Number 15052; LOCATION: Missouri City, Fort Bend County, Texas; TYPE OF FACILITY: on-site sewage; RULE VIOLATED: the Code, §366.051(a), by failing to obtain a permit and hold an approved plan to construct, alter, or repair an on-site sewage system; and the Code, §26.121, by failing to prevent a discharge of untreated or partially treated domestic sewage; PENALTY: $6,875; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Dewalch Technologies, Inc.; DOCKET NUMBER: 2000-0824-MLM-E; IDENTIFIER: SWR Number F0567; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: metal fabricating; RULE VIOLATED: 30 TAC §335.4(1), §305.42(a), and the Code, §26.121, by discharging industrial wastewater into or adjacent to waters in the state without first obtaining authorization; 30 TAC §335.62, §335.593, and 40 CFR §262.11, by failing to perform a proper hazardous waste determination and waste classification; and 30 TAC §324.1, §335.152(a)(1), and 40 CFR §264.171 and §279.22, by failing to properly label and maintain the waste drums to prevent a release; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Eastex Telephone Cooperative, Incorporated; DOCKET NUMBER: 2000- 1239-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Numbers 0025644 (Onalaska), 0025645 (Goodrich), 0025646 (Blanchard), and 0025647 (Coldspring); LOCATION: Onalaska, Goodrich, Livingston, and Coldspring, Polk and San Jacinto Counties, Texas; TYPE OF FACILITY: telephone and communication offices; RULE VIOLATED: 30 TAC §334.49(a) and the Code, §26.3475, by failing to provide proper corrosion protection; 30 TAC §334.51(b)(2)(A), (B), and (C), and the Code, §26.3475, by failing to provide proper tight- fill fittings, spill containment equipment, and overfill protection; and 30 TAC §334.7(d)(3), by failing to provide amended registration for any change or additional information; PENALTY: $26,100; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(19) COMPANY: F & W Forestry Services, Inc. and New Forestry, LLC; DOCKET NUMBER: 2000-0096-AIR-E; IDENTIFIER: Air Account Number MQ-0613-H; LOCATION: Willis, Montgomery County, Texas; TYPE OF FACILITY: prescribed burn; RULE VIOLATED: 30 TAC §101.4, §111.201, and the Act, §382.085(b), by allegedly having performed a 600-acre prescribed burn that caused nuisance conditions; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Faye Liu, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Zaki Ahmad Haboul dba Fast Track Food Store; DOCKET NUMBER: 2000- 1464-PST-E; IDENTIFIER: PST Facility

Identification Number 62925; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and the Code, §382.085(b), by failing to perform annual pressure decay testing; 30 TAC §115.248(2) and the Code, §382.085(b), by failing to train a station representative within three months of previously trained representative leaving; and 30 TAC §334.7(e)(1), by failing as the owner of a petroleum storage tank system to submit tank registration information and provide all information on the registration form; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(21) COMPANY: Goldengate Investment Company, Inc. and Mian Imtiaz dba Northgate Texaco Mart; DOCKET NUMBER: 2000-0833-PST-E; IDENTIFIER: PST Facility Identification Number 0066942; LOCATION: Irving, Dallas County, Texas; TYPE OF FACILITY: underground storage tank systems; RULE VIOLATED: 30 TAC §115.242(3)(a) and the Code, §382.085(b), by failing to have all components installed; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(c), by failing to ensure that the line leak detectors were tested for performance and operability; 30 TAC §115.246(1), (3), and (5), and the Code, §382.085(b), by failing to maintain a copy of the California Air Resource Board Executive Order, keep records of maintenance conducted on any part of the Stage II equipment, maintain records of daily inspections, maintain records of monthly inspections, and maintain records of results of testing conducted at the motor vehicle fuel dispensing facility; and 30 TAC §334.72, by failing to report an accidental discharge and an unusual operating condition; PENALTY: $6,250; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 1101 Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(22) COMPANY: The City of Goree; DOCKET NUMBER: 2000-1331-MWD-E; IDENTIFIER: TPDES Permit Number 10102-001; LOCATION: Goree, Knox County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TPDES Permit Number 10102-001, 30 TAC §305.125(1), and the Code, §26.121, by failing to comply with the 30 mg/l permit limit for BOD5, comply with the upper pH limit of nine standard units, comply with the minimum permit limits for dissolved oxygen of four mg/l, and comply with the permit limits for TSS of 90 mg/l; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(23) COMPANY: Gulshan Enterprises, Inc. dba Handi Plus No. 18; DOCKET NUMBER: 2000-1335-PWS-E; IDENTIFIER: PWS Number 0210052; LOCATION: near Navasota, Brazos County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(b)(2),(c)(2)(F) and (3), (f)(3), and (g)(3) and (4), §290.122(b), (formerly 30 TAC §§290.105(a)(2), 290.106(a), (b)(5), and (e)(1) and (2), and 290.103(5)), by exceeding the maximum contaminant level (MCL) for total coliform bacteria; failing to collect and submit the appropriate number of additional routine bacteriological samples, take the appropriate number of repeat bacteriological samples, collect and submit routine monthly water samples for bacteriological analysis; failing to provide public notice of the MCL exceedance, public notice of the failure to conduct repeat bacteriological sampling, and public notice of the failure to conduct additional and routine monthly bacteriological sampling; PENALTY: $1,400; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 339-0789; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(24) COMPANY: Industrial Models, Inc.; DOCKET NUMBER: 2000-1372-AIR-E; IDENTIFIER: Air Account Number CV-0058-H; LOCATION: Gainesville, Cooke County, Texas; TYPE OF FACILITY: fiberglass manufacturing; RULE VIOLATED: 30 TAC §122.121, §122.130(b)(1) and (b)(2)(D), and the Code, §382.054 and §382.085(b), by failing to submit a Title V abbreviated application and a full application; 30 TAC §116.115(b)(1) and the Code, §382.085(b), by failing to follow General Provision Number 6 of Permit Number 19392 by having doors open allowing particulate matter to escape; and 30 TAC §335.323, by failing to pay hazardous waste generation fees; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Melinda Houlihan, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010- 6499, (817) 469-6750.

(25) COMPANY: Marble Masters of Texas, Incorporated; DOCKET NUMBER: 2001-0045- AIR-E; IDENTIFIER: Air Account Number GL-0042-N; LOCATION: Seguin, Guadalupe County, Texas; TYPE OF FACILITY: cultured marble manufacturing; RULE VIOLATED: 30 TAC §101.10 and the Code, §382.085(b), by failing to submit an emissions inventory questionnaire; PENALTY: $3,125; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239- 1670; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(26) COMPANY: McKenna Memorial Hospital; DOCKET NUMBER: 2000-1234-EAQ-E; IDENTIFIER: Edwards Aquifer Protection Program ID No. 1501.00; LOCATION: New Braunfels, Comal County, Texas; TYPE OF FACILITY: hospital emergency generator fuel tank; RULE VIOLATED: 30 TAC §213.4(a), by failing to obtain approval prior to placement of one 1,400 gallon aboveground PST on the transition zone of the Edwards Aquifer; PENALTY: $720; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(27) COMPANY: Orval Hall Excavating Company; DOCKET NUMBER: 2000-1301-AIR-E; IDENTIFIER: Air Account Number 91-7615-T; LOCATION: Saginaw, Tarrant County, Texas; TYPE OF FACILITY: air curtain trench burner; RULE VIOLATED: 30 TAC §116.110(a) and the Code, §382.085(b), by failing to obtain a permit; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Melinda Houlihan, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(28) COMPANY: Mr. Adram Rhani dba P.T. Conoco; DOCKET NUMBER: 2000-1455-PST-E; IDENTIFIER: PST Facility Identification Number 0013506; LOCATION: Fort Worth, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and the Code, §382.085(b), by failing to successfully perform an annual pressure decay test; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Alita Champagne, (512) 239-0784; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 588-5800.

(29) COMPANY: Polk County; DOCKET NUMBER: 2000-0918-MSW-E; IDENTIFIER: MSW Permit Number 1384; LOCATION: Livingston, Polk County, Texas; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §37.271(5) and §37.111, by failing to demonstrate continuous financial assurance coverage for closure and post-closure care; PENALTY: $800; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(30) COMPANY: The City of Premont; DOCKET NUMBER: 2000-1318-AIR-E; IDENTIFIER: Air Account Number JG-0089-W;

LOCATION: Premont, Jim Wells County, Texas; TYPE OF FACILITY: property; RULE VIOLATED: 30 TAC §111.201, §330.5, and the Code, §382.085(b), by failing to prevent unauthorized outdoor burning; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Carol McGrath, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(31) COMPANY: George Coulam dba Renfaire Water; DOCKET NUMBER: 2000-1348-PWS- E; IDENTIFIER: PWS Number 0930057; LOCATION: Todd Mission, Grimes County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §291.101 and the Code, §13.242(a), by failing to obtain a certificate of convenience and necessity before rendering retail water service to the public; PENALTY: $438; ENFORCEMENT COORDINATOR: Shawn Stewart, (512) 239-6684; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(32) COMPANY: Thomas Investments, Inc. dba Richmond Cleaners; DOCKET NUMBER: 2000-0619-IHW-E; IDENTIFIER: Industrial and Hazardous Waste Number F0469; LOCATION: Texarkana, Bowie County, Texas; TYPE OF FACILITY: dry cleaning operation; RULE VIOLATED: 30 TAC §335.4, §327.5(a), and the Code, §26.121, by failing to control discharges of perchloroethylene (PERC) from washing machines, drying machines, a 20-gallon storage container, and take appropriate action to immediately abate and clean-up the spill; 30 TAC §335.6, by failing to notify the executive director of the intended storage, processing, or disposal of industrial solid waste; 30 TAC §327.3(b) and the Code, §26.039, by failing to notify the TNRCC of a 20-gallon spill of PERC onto a paved area; and 30 TAC §335.9(A)(1), by failing to maintain records pertaining to purchases of PERC; PENALTY: $600; ENFORCEMENT COORDINATOR: Steven Lopez, (512) 239-1896; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(33) COMPANY: Stephens County Rural Water Supply Corporation; DOCKET NUMBER: 2000-1088-PWS-E; IDENTIFIER: PWS Number 2150007; LOCATION: Breckenridge, Stephens County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iii), (iv), (v), and (f)(6), by failing to provide a service pump capacity such that each pump station or pressure plane has two or more pumps with a total capacity of two gallons per connection or a total capacity of 1,000 gpm, provide pressure maintenance facilities consisting of either 100 gallons per connection of elevated storage or a pressure tank capacity of 20 gallons per connection, and provide emergency power to deliver water to the distribution system; PENALTY: $875; ENFORCEMENT COORDINATOR: James Beauchamp, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(34) COMPANY: Mr. Roger Van Voorhees and Mr. Norman Deike, A Partnership dba Magic Enterprises dba Sunset Woods Water System; DOCKET NUMBER: 2000-0470-PWS-E; IDENTIFIER: PWS Number 0270092; LOCATION: Marble Falls, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.111(c)(1), (formerly 30 TAC §290.119(1)), by failing to conduct daily turbidity monitoring; 30 TAC §290.46(n) and (u), (formerly 30 TAC §290.46(x)), by failing to have a map of the distribution system and either plug or cap an abandoned public water supply well; 30 TAC §290.43(d)(9), by installing more than three hydropneumatic tanks at one site; 30 TAC §290.45(b)(1)(C)(i) and (iv), by failing to either provide a minimum well capacity of 0.6 gpm per service connection or obtain a variance to that requirement and provide a hydropneumatic tank capacity of 20 gallons per connection; 30 TAC §290.42(e)(7), by storing the hypochlorination solution in a container that was not covered and housed in a building that was not locked; 30 TAC §290.118(a), (formerly 30 TAC §290.113(a)), by having the concentration of fluoride in the water supply above the secondary constituent level for fluoride of two mg/l; and 30 TAC §291.76 and the Code, §5.235(n), by failing to pay the regulatory assessment fee; PENALTY: $1,688; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(35) COMPANY: Superior Lawn Service, Inc.; DOCKET NUMBER: 2000-1447-AIR-E; IDENTIFIER: Air Account Number JE-0687-S; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: lawn maintenance service; RULE VIOLATED: 30 TAC §111.201, §330.5, and the Code, §382.085(b), by allegedly allowing unauthorized outdoor burning of lawn maintenance debris at a business property; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(36) COMPANY: Thalia Water Supply Corporation; DOCKET NUMBER: 2000-1237-PWS-E; IDENTIFIER: PWS Number 0780013; LOCATION: Thalia, Foard County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(b) and (c)(3), (formerly 30 TAC §290.106(a) and (b), and §290.105(b)), by failing to collect and submit routine monthly water samples for bacteriological analysis, exceeding the maximum contaminant level for total coliform bacteria, and taking the appropriate number of repeat bacteriological samples; PENALTY: $2,188; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(37) COMPANY: Turbine Chrome Services, Inc.; DOCKET NUMBER: 2000-0981-AIR-E; IDENTIFIER: Air Account Number HG-1274-Q; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: hard chrome electroplating; RULE VIOLATED: 30 TAC §116.110(a)(4), §106.452(1)(A), and the Code, §382.085(b), by failing to operate an enclosed abrasive cleaning operation in which the emissions are evacuated through a fabric filter with a maximum filtering velocity of four feet per minute; PENALTY: $2,880; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(38) COMPANY: Vista Stores L.L.C.; DOCKET NUMBER: 2000-1113-PST-E; IDENTIFIER: PST Facility Identification Number 0015607; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and the Code, §382.085(b), by failing to conduct Stage II pressure decay compliance testing; 30 TAC §115.244(3) and the Code, §382.085(b), by failing to conduct monthly Stage II inspections; and 30 TAC §115.222(3) and the Code, §382.085(b), by failing to repair the leaking premium unleaded gasoline Stage I dry break; PENALTY: $2,160; ENFORCEMENT COORDINATOR: Bill Davis, (512) 239-6793; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(39) COMPANY: W-Industries, Inc.; DOCKET NUMBER: 2000-1188-MWD-E; IDENTIFIER: Water Quality Permit Number 13497-001 (Expired); LOCATION: Jersey Village, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Water Quality Permit Number 13497-001 and the Code, §26.121, by failing to prevent the unauthorized disposal of wastewater; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(40) COMPANY: West Hardin County Consolidated Independent School District; DOCKET NUMBER: 2000-0963-MWD-E; IDENTIFIER: TPDES Permit Number 11271-001; LOCATION: Saratoga, Hardin County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11271-001, and the Code, §26.121, by failing to comply with permit limits for TSS, submit notification of effluent violations, and prevent the discharge of untreated sewage; PENALTY: $6,250; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(41) COMPANY: West Houston Airport Corporation; DOCKET NUMBER: 2000-0709-MWD- E; IDENTIFIER: TPDES Permit Number 12516-001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 12516-001, and the Code, §26.121, by failing to meet the permit effluent limits for ammonia-nitrogen, carbonaceous BOD, TSS, and dissolved oxygen, and submit the discharge monitoring reports by the due date; PENALTY: $18,000; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023- 1486, (713) 767-3500.

TRD-200101779
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: March 27, 2001

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Notice of Public Hearing (Chapter 101 and State Implementation Plan)

The Texas Natural Resource Conservation Commission (commission) will conduct a public hearing to receive testimony concerning an amendment to 30 TAC Chapter 101 and a revision to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs. The amendment to Chapter 101 is a proposed revision to the SIP.

The proposed amendment would specify the requirement for certain sources of emissions of nitrogen oxides (NO_x) to obtain emission allowances under the cap and trade program that was adopted for the Houston/Galveston (HGA) ozone nonattainment area and published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 283). The amendment would specify that stationary facilities that emit NO_x which are subject to emission requirements under 30 TAC Chapter 117 and which are located at a site where their collective design capacity to emit NO_x is ten tons or more per year, must obtain and use allowances in compliance with 30 TAC Chapter 101, Subchapter H, Division 3. In the preamble to the HGA NO_x cap and trade rules published on January 12, 2001, the commission stated its intent to propose the appropriate amendment to the cap and trade rules shortly after their adoption to clarify their application to facilities and groups of facilities at a site.

A public hearing on this proposal will be held in Houston on April 26, 2001, at 2:00 p.m., at the City of Houston Pollution Control Building Auditorium, located at 7411 Park Place Boulevard. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2001- 015-101-AI, and must be received by 5:00 p.m., April 26, 2001. For further information, please contact Alan Henderson, Policy and Regulations Division, (512) 239-1510.

TRD-200101689
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 23, 2001

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Notice of Public Hearing (Chapter 114 and State Implementation Plan)

The Texas Natural Resource Conservation Commission (commission) will conduct a public hearing to receive testimony concerning revisions to 30 TAC Chapter 114, specifically the repeal of §§114.400, 114.402, 114.406, 114.409; and to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs. The repeals are proposed as revisions to the SIP.

These proposed revisions to Chapter 114 would repeal the rules regarding airport ground support equipment (GSE) which were adopted on April 19, 2000 for the Dallas/Fort Worth (DFW) ozone nonattainment area. The anticipated emissions reductions from these repealed rules will be replaced with reductions from commission orders made with commercial airline carriers and memorandums of agreement made with the airport operators.

The commission has also proposed agreements with Delta Air Lines, Southwest Airlines, and the City of Dallas as revisions to the SIP. The agreements would make federally enforceable certain reductions of ozone precursor emissions of NO_x from sources at Love Field and at DFW International Airport.

A public hearing on this proposal will be held in Arlington on April 27, 2001 at 11:00 a.m. at the North Central Texas Council of Governments, 2nd Floor Board Room, located at 616 Six Flags Drive, Suite 200. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearings; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearings and will answer questions before and after the hearings.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2001- 013a-114-AI, and must be received by 5:00 p.m., April 27, 2001. For further information, please contact Heather Evans, Strategic Assessment Division, (512) 239-1970 or Alan Henderson, Policy and Regulations Division, (512) 239-1510.

TRD-200101690
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 23, 2001

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North Central Texas Council of Governments

Request for Proposals to Implement a Bicycle and Pedestrian Public Education and Information Campaign for the Dallas-Fort Worth Region

CONSULTANT PROPOSAL REQUEST

This request by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

NCTCOG is requesting written proposals to implement a bicycle and pedestrian public education and information campaign for the Dallas-Fort Worth (DFW) Metropolitan Area. This campaign will encourage public participation and support for the transportation elements of the State Implementation Plan (SIP) developed by the Texas Natural Resource Conservation Commission. The focus for this program is on increasing the number of persons bicycling and walking for transportation purposes. The campaign will include training, education, paid advertising, public service announcements, media relations, special events, business community outreach, and other components agreed on by the consultant and Project Review Committee.

Due Date

Proposals must be submitted no later than 5 p.m., Central Time, on Friday, April 27, 2001, to Mike Sims, Principal Transportation Planner, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011. For more information and copies of the Request for Proposals, contact Mike Sims at (817) 695- 9226.

Contract Award Procedures

The firm selected to perform this study will be recommended by a Project Review Committee. The PRC will use evaluation criteria and methodology consistent with the scope of services contained in the Request for Proposals. The NCTCOG Executive Board will review the PRC's recommendations and, if found acceptable, will issue a contract award.

Regulations

NCTCOG, in accordance with Title VI of the Civil Rights Act of 1964, 78 Statute 252, 41 United States Code 2000d to 2000d-4; and Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 1, Nondiscrimination in Federally Assisted Programs of the Department of Transportation issued pursuant to such act, hereby notifies all proposers that it will affirmatively assure that in regard to any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full opportunity to submit proposals in response to this invitation and will not be discriminated against on the grounds of race, color, sex, age, national origin, or disability in consideration of an award.

TRD-200101799
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: March 28, 2001

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Public Utility Commission of Texas

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 March 21, 2001, 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 New Access Communications LLC for a Service Provider Certificate of Operating Authority, Docket Number 23854 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service and long distance 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 April 11, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200101663
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 22, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §25.181

Notice is given to the public of the filing with the Public Utility Commission of Texas (P.U.C. or commission) of an application on March 23, 2001, for waiver of the limitation on energy efficiency incentive payments imposed by P.U.C. Substantive Rule §25.181(h)(3).

Docket Title and Number: Application of West Texas Utilities Company for Waiver of the Limitation on Energy Efficiency Incentive Payment Under P.U.C. Substantive Rule §25. 181(h)(3). Docket Number 23865.

The Application: WTU requests the commission grant the joint motion of WTU and the commission's legal division for waiver of the 20% limitation imposed by §25.181(h)(3). P.U.C. Substantive Rule §25.181(h)(3) limits the amount that an individual energy efficiency service provider and its affiliates may receive to no more than 20% of the total incentive payments available for a particular standard offer contract. The rule permits a utility to petition for waiver of this limitation if the utility can demonstrate that the utility would not be able to meet its annual energy savings goal under this limitation.

WTU reports that Sempra Energy has expressed strong interest in developing a project in WTU's service territory that would provide significant energy and demand savings. According to WTU's application, Sempra's proposed project would be eligible to earn approximately 51% of the funds budgeted for the 2000-2001 transition period and is viable only if those incentives are available for the entire project. WTU estimates that Sempra's proposed project would amount to approximately 72% of WTU's targets for energy and demand savings in 2001.

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. All comments should reference Docket Number 23865.

TRD-200101790
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 27, 2001

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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 February 14, 2001, 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 Mosheim Exchange for Expanded Local Calling Service, Project Number 23685.

The petitioners in the Mosheim exchange request ELCS to the exchanges of Clifton, Cranfills Gap, Gatesville, and Hamilton.

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 April 11, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200101775
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 26, 2001

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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 March 5, 2001, 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 Earth Exchange for Expanded Local Calling Service, Project Number 23702.

The petitioners in the Earth exchange request ELCS to the exchanges of Amherst, Littlefield, Muleshoe, Olton, and Plainview.

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 April 23, 2001. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200101776
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 26, 2001

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Public Notice of Amendment to Interconnection Agreement

On March 20, 2001, Southwestern Bell Telephone Company and FEC Communications, LLP, collectively referred to as applicants, filed a joint application for approval of an amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23852. 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 23852. 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 April 19, 2001, 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 23852.

TRD-200101782
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 27, 2001

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Public Notice of Amendment to Interconnection Agreement

On March 20, 2001, Southwestern Bell Telephone Company and E.T. Telephone, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23853. 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 23853. 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 April 19, 2001, 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 23853.

TRD-200101783
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 27, 2001

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Public Notice of Interconnection Agreement

On March 19, 2001, Southwestern Bell Telephone Company and IPVoice Communications, Inc., collectively referred to as applicants, filed a joint application for approval of an interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23844. 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 23844. 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 April 19, 2001, 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 23844.

TRD-200101781
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 27, 2001

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Public Notice of Interconnection Agreement

On March 19, 2001, Southwestern Bell Telephone Company and NetworkIP, LLC, collectively referred to as applicants, filed a joint application for approval of an interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23843. 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 23843. 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 April 19, 2001, 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 23843.

TRD-200101780
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 27, 2001

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Public Notice of Interconnection Agreement

On March 26, 2001, United Telephone Company of Texas, Inc., doing business as Sprint, Central Telephone Company of Texas doing business as Sprint (collectively, Sprint), and Smoke Signal Communications, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23867. 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 23867. 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 April 23, 2001, 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 23867.

TRD-200101788
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 27, 2001

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Public Notice of Interconnection Agreement

On March 26, 2001, FamilyTel of Texas, LLC, Texas Alltel, Inc., and Sugarland Telephone Company, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23868. 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 23868. 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 April 23, 2001, 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 23868.

TRD-200101789
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 27, 2001

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Texas Department of Transportation

Public Notice

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site - http://www.dot.state.tx.us - click on Aviation, click on Aviation Public Hearing. Or, contact Karon Wiedemann, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4520 or 800 68 PILOT.

TRD-200101672
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: March 23, 2001

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Texas A&M University, Board of Regents

Request for Proposal

Texas A&M University requests proposals from consulting firms qualified to assist in the development of a master file classification plan for the University's records management program. Interested firms should be thoroughly versed and experienced in the field of records management and must be a Certified Records Manager with at least 10 years of records management experience.

Information can be obtained by contacting Rex Janne, Director of Purchasing Services, Texas A&M University, P.O. Box 30013, College Station, Texas 77842-0013 or e-mail at r-janne@tamu.edu.

Selection criteria will include competence, experience, knowledge, qualification and reasonableness of price. Historically Underutilized Businesses are encouraged to participate in this request for proposal.

All things being equal, a preference will be given to a consultant firm whose principal place of business is within the State of Texas. Proposals must be received on or before 2:00 p.m., April 24, 2001.

TRD-200101777
Vickie Burt Spillers
Executive Secretary to the Board
Texas A&M University, Board of Regents
Filed: March 26, 2001

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January - December 2001 Publication Schedule

Filing deadlines for publication in the *Texas Register* are 12 noon Monday for rules and 12 noon Wednesday for miscellaneous documents and meeting notices. These deadlines are for publication. ***They are not related to posting requirements for open meeting notices.*** Because of printing and mailing schedules, documents received after the deadline for an issue cannot be published until the next issue. An asterisk beside a publication date indicates that the deadlines are early due to state holidays.

Issue date	**Rules:** **12 Noon**	**Other Documents:** **12 Noon**
1 Friday, January 5	**Friday, December 22*	Wednesday, December 27
2 Friday, January 12	**Friday, December 31*	Wednesday, January 3
3 Friday, January 19 *Annual Index*	Monday, January 8	Wednesday, January 10
4 Friday, January 26	**Friday, January 12*	Wednesday, January 17
5 Friday, February 2	Monday, January 22	Wednesday, January 24
6 Friday, February 9	Monday, January 29	Wednesday, January 31
7 Friday, February 16	Monday, February 5	Wednesday, February 7
8 Friday, February 23	Monday, February 12	Wednesday, February 14
9 Friday, March 2	**Friday, February 16*	Wednesday, February 21
10 Friday, March 9	Monday, February 26	Wednesday, February 28
11 Friday, March 16	Monday, March 5	Wednesday, March 7
12 Friday, March 23	Monday, March 12	Wednesday, March 14
13 Friday, March 30	Monday, March 19	Wednesday, March 21
14 Friday, April 6	Monday, March 26	Wednesday, March 28
15 Friday, April 13 *First Quarterly Index*	Monday, April 2	Wednesday, April 4
16 Friday, April 20	Monday, April 9	Wednesday, April 11
17 Friday, April 27	Monday, April 16	Wednesday, April 18
18 Friday, May 4	Monday, April 23	Wednesday, April 25
19 Friday, May 11	Monday, April 30	Wednesday, May 2

Issue date	**Rules:** **12 Noon**	**Other Documents:** **12 Noon**
20 Friday, May 18	Monday, May 7	Wednesday, May 9
21 Friday, May 25	Monday, May 14	Wednesday, May 16
22 Friday, June 1	Monday, May 21	Wednesday, May 23
23 Friday, June 8	**Friday, May 25*	Wednesday, May 30
24 Friday, June 15	Monday, June 4	Wednesday, June 6
25 Friday, June 22	Monday, June 11	Wednesday, June 13
26 Friday, June 29	Monday, June 18	Wednesday, June 20
27 Friday, July 6	Monday, June 25	Wednesday, June 27
28 Friday, July 13 *Second Quarterly Index*	Monday, July 2	**Tuesday, July 3*
29 Friday, July 20	Monday, July 9	Wednesday, July 11
30 Friday, July 27	Monday, July 16	Wednesday, July 18
31 Friday, August 3	Monday, July 23	Wednesday, July 25
32 Friday, August 10	Monday, July 30	Wednesday, August 1
33 Friday, August 17	Monday, August 6	Wednesday, August 8
34 Friday, August 24	Monday, August 13	Wednesday, August 15
35 Friday, August 31	Monday, August 20	Wednesday, August 22
36 Friday, September 7	Monday, August 27	Wednesday, August 29
37 Friday, September 14	**Friday, August 31*	Wednesday, September 5
38 Friday, September 21	Monday, September 10	Wednesday, September 12
39 Friday, September 28	Monday, September 17	Wednesday, September 19
40 Friday, October 5	Monday, September 24	Wednesday, September 26
41 Friday, October 12 *Third Quarterly Index*	Monday, October 1	Wednesday, October 3
42 Friday, October 19	Monday, October 8	Wednesday, October 10
43 Friday, October 26	Monday, October 15	Wednesday, October 17
44 Friday, November 2	Monday, October 22	Wednesday, October 24

Issue date	**Rules:** **12 Noon**	**Other Documents:** **12 Noon**
45 Friday, November 9	Monday, October 29	Wednesday, October 31
46 Friday, November 16	Monday, November 5	Wednesday, November 7
47 Friday, November 23	Monday, November 12	Wednesday, November 14
48 Friday, November 30	Monday, November 19	Wednesday, November 21
49 Friday, December 7	Monday, November 26	Wednesday, November 28
50 Friday, December 14	Monday, December 3	Wednesday, December 5
51 Friday, December 21	Monday, December 10	Wednesday, December 12
52 Friday, December 28	Monday, December 17	Wednesday, December 19

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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