TEXAS REGISTER

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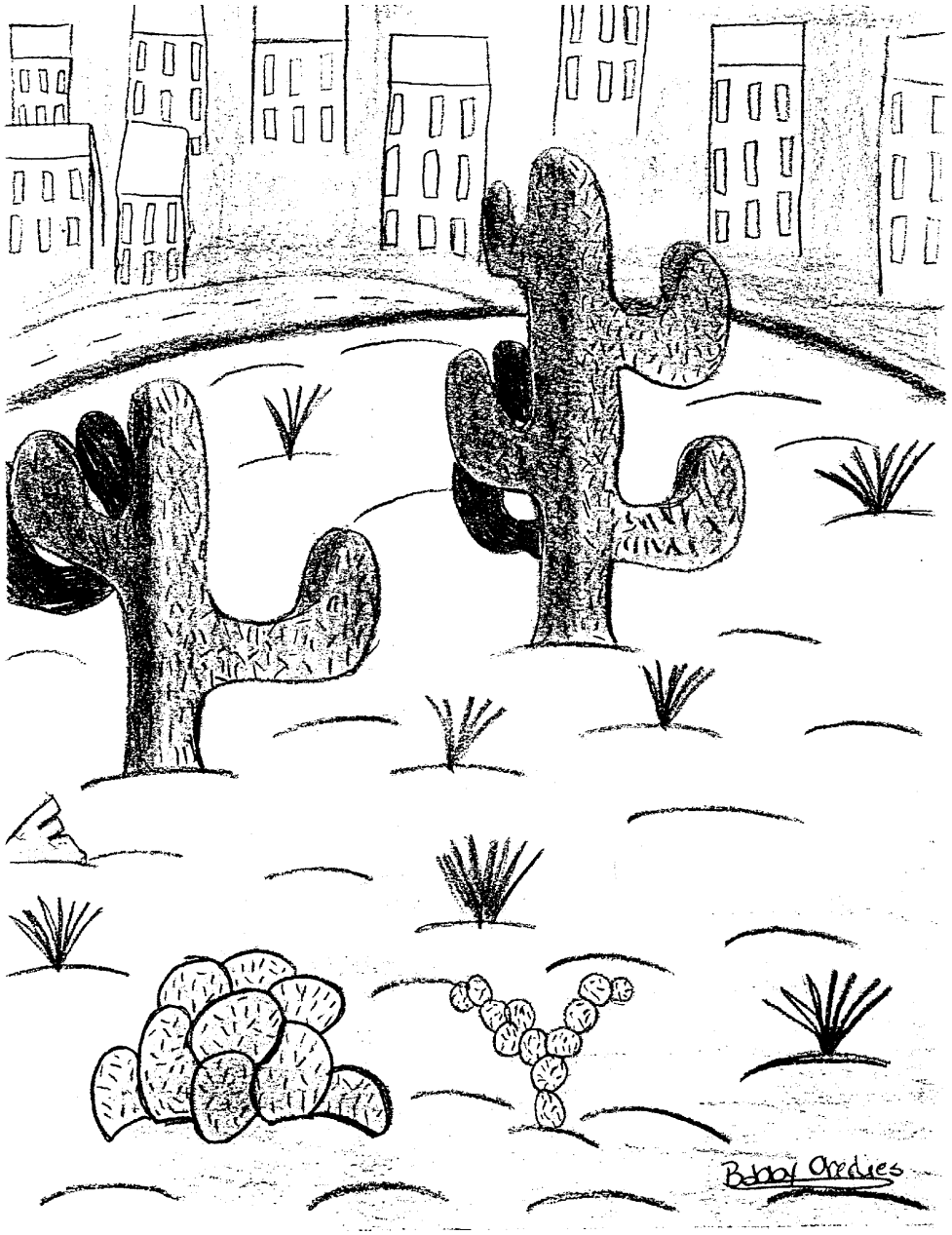

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8th Grade
Loflin Middle School

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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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Open Meetings

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

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

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

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

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

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

THE GOVERNOR

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

Appointments

Appointments for July 25, 2002

Appointed to the Brazos Valley Regional Review Committee (Region 13) for terms to expire on January 1, 2003, Commissioner Carey Cauley, Jr. of Bryan, Commissioner Ray Gaskin of Centerville, Judge Ira E. Haynie of Anderson, Councilwoman Molly A. Hedrick of Franklin, Mayor Byron M. Ryder of Buffalo, Alderman Allan Grant Willis of Caldwell.

Appointed to the Brazos Valley Regional Review Committee (Region 13) for terms to expire on January 1, 2004, Councilman Charles Bowman of Hearne, Mayor Martin H. Gustafson of Somerville, Judge Alvin W. Jones of Bryan, Commissioner Robert Mikeska of Brenham, Judge Dorothy D. Morgan of Brenham, Judge Cecil N. Neely of Madisonville.

Appointed to the Cosmetology Commission of Texas for a term to expire on December 31, 2007, Philip D. Lapp of Weatherford (replacing Comer Cottrell of Dallas whose term expired).

Appointed to the Texas County and District Retirement System for a term to expire on December 31, 2007, Victor G. Carillo of Abilene (replacing Bill Melton of Dallas whose term expired).

Appointed to the Drug Demand Reduction Advisory Council, pursuant to SB 558, 77th Legislature, for terms at the pleasure of the Governor, James C. Oberwetter, Chairman of Dallas, Beverly Barron, Vice Chair of Odessa, Cathey Brown of Dallas, Clara Contreras of Edinburg, Tommy Cowan of Austin, Stephanie Haynes of Alpine, Tracy Levins of Austin, Randy Shell of Austin, Rev. Leslie Smith of Houston, Vickie Spriggs of Austin, Salvador Balcorta, CEO of El Paso, George Comiskey of Lubbock, Michelle Deaver of Dallas, Paula Gomez of Brownsville, Bob Gonzales of San Antonio, Dietrich Johnson of Longview, Nicole Masterjohn of Austin, Dawn Mathis of Houston, Jacob Patino of San Antonio, Barry Sharp of Austin.

Designated as Chairman of the East Texas Regional Review Committee for a term at the pleasure of the Governor, Olin Joffrion, Jr. of Carthage.

Appointed to the East Texas Regional Review Committee (Region 6) for terms to expire on January 1, 2003, Alderman William W. Brown of Jefferson, Alderman Faron L. Cain of Hallsville, Councilmember Don Copeland of Chandler, Commissioner Olin Joffrion, Jr. of Carthage, Mayor Bobbie Harman of East Tawakoni, Councilmember Ann T. Reeves of Pittsburg.

Appointed to the East Texas Regional Review Committee (Region 6) for terms to expire on January 1, 2004, Judge W. J. "Bill" Alexander of Quitman, Commissioner Janice Hancock of Kilgore, Judge Jeff Fisher of Canton, Commissioner Bill Hale of Henderson, Judge Larry Thomas Craig of Tyler, Mayor Diane R. Parker of Elkhart.

Appointed to the State Board of Examiners of Marriage and Family Therapists for a term to expire February 1, 2007, B. W. McClendon, D. Min. of Austin (replacing Blas Castaneda who resigned).

Appointed to the North Central Texas Regional Review Committee (Region 4) for terms to expire on January 1, 2003, Commissioner Jonathan R. Glass of Corsicana, Commissioner William J. (Jack) Hatchell of McKinney, Commissioner Ken Leonard of Kaufman, Councilman Steven J. Reid of Granbury, Councilwoman Mary Ann Seale of Plano, Commissioner Troy T. Thompson of Cleburne.

Appointed to the North Central Texas Regional Review Committee (Region 4) for terms to expire on January 1, 2004, Commissioner Ron Brown - *Chair* of Midlothian, Mayor Lois Cagle of Quinlan, Mayor Tom O'Neal Durington of Alvarado, Commissioner Kyle E. Stephens of Decatur, Treasurer Jim Thorpe of Weatherford, Commissioner Jerry M. Wimpee of Rockwall.

Appointed to the South East Texas Regional Review Committee (Region 15) for terms to expire on January 1, 2003, Mayor Ruth Vee Dubuisson of Rose City, Commissioner Waymon D. Hallmark of Port Arthur, Mayor Homer E. Nagel of Nederland, Judge Carl K. Thibodeaux of Orange, Mayor Ricardo R. Trevino of Orange.

Appointed to the South East Texas Regional Review Committee (Region 15) for terms to expire on January 1, 2004, Commissioner Jimmie P. Cokinos of Beaumont, Mayor Roy C. McDonald of West Orange, Commissioner Kenneth Aaron Pelt of Kountze, Mayor Bruce Robinson of Sour Lake, Mayor Dean T. Robinson of Silsbee, Mayor Fred E. Williams of Kountze.

Rick Perry, Governor

TRD-200204852

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OFFICE OF THE ATTORNEY GENERAL

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

Opinions

Opinion No. JC-0531

Eduardo J. Sanchez, M.D., M.P.H., Commissioner of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199

Re: Whether chapter 150, subchapter A or B of the Texas Agriculture Code violates the Commerce Clause of the United States Constitution, and related questions (RQ-0478-JC)

S U M M A R Y

A court probably would conclude that chapter 150, subchapter A of the Agriculture Code, which requires imported meat to be labeled with the country of origin, violates the Commerce Clause, article I, section 8, clause 3, of the United States Constitution. See U.S. Const. art. I, §8, cl. 3; Tex. Agric. Code Ann. ch. 150, subch. A (Vernon Supp. 2002). The Texas Department of Health, which is charged with enforcing the labeling requirement, has not adopted any rules implementing chapter 150, subchapter A. Beginning on September 30, 2004, however, federal law will require retailers of certain meat products to "inform consumers . . . of the [product's] country of origin." Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §10816, 116 Stat. 134, 534 (2002) (to be codified at 7 U.S.C. §§1638-1638d). And, by September 30, 2002, the United States Secretary of Agriculture will issue guidelines for "voluntary country of origin labeling." See id. sec. 284(a), 116 Stat. 134, 535 (2002) (to be codified at 7 U.S.C. 1638c). Being a federal law, as opposed to a state law, this provision would not be subject to a Commerce Clause objection and would ultimately appear to accomplish the same result sought by the state statute in question.

On the other hand, a court probably would conclude that chapter 150, subchapter B of the Agriculture Code does not violate the Commerce Clause of the United States Constitution. See U.S. Const. art. I, §8, cl. 3; Tex. Agric. Code Ann. ch. 150, subch. B (Vernon Supp. 2002). Section 150.012 of the Agriculture Code, part of chapter 150, subchapter B, forbids a state agency or political subdivision to purchase imported beef or products using imported beef, Tex. Agric. Code Ann. §150.012(a) (Vernon Supp. 2002), and is an example of the state participating in the market as a consumer. See White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 207-08 (1983).

Opinion No. JC-0532

The Honorable Mark Burtner, Lamar County Attorney, 119 North Main Street, Paris, Texas 75460

Re: Validity of a mutual assistance agreement that would permit a municipal police officer to answer calls in the county and outside municipal jurisdiction (RQ-0498-JC)

S U M M A R Y

The authority of certain local governments to enter into mutual assistance agreements pursuant to section 362.002(b) of the Local Government Code is not dependent on the existence of a state of civil emergency. A city police officer acting within a county on the basis of such an agreement is, under the terms of section 362.003 of the Local Government Code, within his or her jurisdiction when enforcing traffic laws in the county.

Opinion No. JC-0533

Ms. Sheila W. Beckett, Executive Director, Employees Retirement System of Texas, 1801 Brazos Street, Austin, Texas 78711

Mr. Jerry L. Benedict, Administrative Director, Office of Court Administration, 205 West 14th Street, Suite 600, Austin, Texas 78711-2066

Re: Whether sections 834.102(b) and 839.102(b), Texas Government Code, apply to visiting judges who retired prior to January 1, 2002 (RQ-0505-JC)

S U M M A R Y

Sections 834.102(b) and 839.102(b) of the Government Code increase retirement benefits for a visiting judge who "has served as a visiting judge in this state and the first anniversary of the last day of that service has not occurred." Tex. Gov. Code Ann. §§834.102(b), 839.102(b) (Vernon Supp. 2002). These provisions operate prospectively and apply only to visiting judges who retire after the January 1, 2002 effective date. They do not provide the additional benefits to a visiting judge who retired before the effective date of the provisions.

Opinion No. JC-0534

The Honorable Juan J. Hinojosa, Chair, House Committee on Criminal Jurisprudence, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Application of section 1704.302, Texas Occupations Code, to an employee of a family- owned bail bond business when the business is purchased by another relative (RQ-0507-JC)

S U M M A R Y

Section 1704.302(c) of the Texas Occupations Code, as amended by Senate Bill 1119 of the Seventy-seventh Texas Legislature, prohibits the employment of a convicted felon by a bail bonding business unless that person was employed by the business before the section's effective date. A person whose continued employment by a family-owned bail bonding business is permissible despite the amendment of section 1704.302(c) of the Occupations Code does not forfeit that status solely because the business in which he is employed changes hands within the family.

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

TRD-200204958
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: July 31, 2002

♦ ♦ ♦

Requests for Opinions

RQ-0576

The Honorable Bruce Isaacks, Denton County District Attorney, 1450 East McKinney, Suite 3100, Denton, Texas 76202

Re: Whether certain statutory county court judges in Denton County are entitled to additional compensation (Request No. 0576-JC)

Briefs requested by August 29, 2002

RQ-0577

The Honorable Clyde Alexander, Chair, Transportation Committee, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910

Re: Whether a county may make improvements to a subdivision road under particular circumstances (Request No. 0577-JC)

Briefs requested by August 29, 2002

RQ-0578

Mr. Thomas A. Davis, Jr., Director, Texas Department of Public Safety, 5805 North Lamar Boulevard, Austin, Texas 78773-0001

Re: Whether a local law enforcement agent is required, under the registration of sex offenders statute, to publish notice of a person convicted of possession or promotion of child pornography (Request No. 0578-JC)

Briefs requested by August 29, 2002

RQ-0579

The Honorable John W. Segrest, McLennan County Criminal District Attorney, 219 North Sixth Street, Suite 200, Waco, Texas 76701

Re: Whether a bail bond board may release security in excess of that required to maintain the statutory ratio of security to bond obligations (Request No. 0579-JC)

Briefs requested by August 29, 2002

RQ-0580

The Honorable Frank Madla, Chair, Intergovernmental Relations Committee, Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068

Re: Effect of certain annexations on the extraterritorial jurisdiction of the City of San Antonio (Request No. 0580-JC)

Briefs requested by August 29, 2002

For further information, please access the Attorney General's website at www.oag.state.tx.us. *or call the Opinion Committee at 512/ 463-2110.*

TRD-200204957
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: July 31, 2002

♦ ♦ ♦

EMERGENCY RULES

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

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

TITLE 1. ADMINISTRATION

PART 8. TEXAS JUDICIAL COUNCIL

CHAPTER 173. INDIGENT DEFENSE

SUBCHAPTER A. GENERAL GRANT PROGRAM PROVISIONS

1 TAC §§173.1 - 173.8

The Texas Judicial Council is renewing the effectiveness of the emergency adoption of new §§173.1 - 173.8, for a 60-day period. The text of the new sections were originally published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2911).

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204558
Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Effective date: July 27, 2002
Expiration date: September 25, 2002
For further information, please call: (512) 936-6994

♦ ♦ ♦

SUBCHAPTER B. ELIGIBILITY, GRANT FUNDING AND EXPENDITURE REPORTING

1 TAC §§173.101 - 173.104

The Texas Judicial Council is renewing the effectiveness of the emergency adoption of new §§173.101 - 173.104, for a 60-day period. The text of the new sections were originally published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2913).

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204559
Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Effective date: July 27, 2002
Expiration date: September 25, 2002
For further information, please call: (512) 936-6994

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SUBCHAPTER C. CONDITIONS OF GRANT FUNDING

1 TAC §173.201, §173.202

The Texas Judicial Council is renewing the effectiveness of the emergency adoption of new §173.201 and §173.202, for a 60-day period. The text of the new sections were originally published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2913).

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204560
Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Effective date: July 27, 2002
Expiration date: September 25, 2002
For further information, please call: (512) 936-6994

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SUBCHAPTER D. ADMINISTERING GRANTS

1 TAC §§173.301 - 173.311

The Texas Judicial Council is renewing the effectiveness of the emergency adoption of new §§173.301 - 173.311, for a 60-day period. The text of the new sections were originally published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2914).

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204561
Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Effective date: July 27, 2002
Expiration date: September 25, 2002
For further information, please call: (512) 936-6994

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SUBCHAPTER E. PROGRAM MONITORING AND AUDITS

1 TAC §173.401, §173.402

The Texas Judicial Council is renewing the effectiveness of the emergency adoption of new §173.401 and §173.402, for a 60-day period. The text of the new sections were originally

published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2915).

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204562
Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
Effective date: July 27, 2002
Expiration date: September 25, 2002
For further information, please call: (512) 936-6994

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TITLE 34. PUBLIC FINANCE

PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. INSURANCE PROGRAMS SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH

34 TAC §41.40, §41.44

The Teacher Retirement System of Texas (TRS) adopts on an emergency basis new §41.40 and §41.44, concerning the Texas School Employees Uniform Group Health Coverage Program ("Program"). The new §41.40 relates to insurance coverage under the Program for eligible individuals who are placed on leave-without-pay status by their employers. In connection with the Program, new §41.44 relates to payment of additional support for certain school districts paying social security taxes. These new sections are adopted on an emergency basis pursuant to §2001.034 of the Government Code, which allows a state agency to adopt an emergency rule if a requirement of state or federal law requires adoption of the rule on less than 30 days notice. These new sections are simultaneously being proposed for permanent adoption in this issue of the *Texas Register*.

In accordance with Insurance Code article 3.50-7, §41.40 establishes criteria for continuation of coverage under the Program for eligible individuals employed by eligible entities if they are covered under the Program and are placed on leave-without-pay status. In addition, the new section establishes certain criteria for enrollment of otherwise eligible individuals who are on leave-without-pay status at the time their employer first becomes a participating entity under the Program. The new section also establishes timelines for termination of coverage that continues in accordance with the section.

In accordance with Insurance Code article 3.50-7 and Insurance Code article 3.50-9, §41.44 sets forth the procedures and timelines for eligible school districts to notify TRS of amounts payable to them under the law. The new section provides standards for calculation of the amounts payable, sets forth the TRS process for accepting or rejecting statements and remitting funds, and provides that TRS may take appropriate action to recover any amounts that were not properly remitted. In addition, the new section describes the procedure for allocating remittance among eligible districts if appropriate amounts are insufficient to cover all statements submitted.

This emergency adoption is necessary because TRS is required to comply with timelines under House Bill 3343, 77th Legislature, including Insurance Code article 3.50-7, Insurance Code 3.50-9, and §§5.01 - 5.07 of Acts 2001, 77th Legislature, chapter 1187 including requirements in §5.01 that TRS develop coverage plans "with coverage beginning September 1, 2002." TRS finds that these requirements of state law require the adoption of the new sections on fewer than 30 days notice.

The new sections are adopted on an emergency basis under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for, among other things, the transaction of business of the board. The new sections are also adopted under House Bill 3343, which was passed by the 77th Legislature, 2001, including Insurance Code article 3.50-7, which authorizes TRS to adopt rules to administer the program. Section 41.44 is also adopted under Insurance Code article 3.50-9, §6, which authorizes TRS to adopt rules as necessary to implement that section. Insurance Code article 3.50-7, §3(c) further authorizes TRS, as trustee, to "adopt rules relating to the program as considered necessary by the trustee." As described above, the sections are also adopted under Government Code §2001.034.

There are no other codes affected.

§41.40. Coverage Continuation While on Leave Without Pay.

(a) Full-time and part-time employees covered under the TRS-ActiveCare program who are placed on leave-without-pay-status by a participating entity in accordance with that entity's personnel policies, and their eligible covered dependents, may continue participation in the TRS-ActiveCare program in accordance with this section under the coverage plan in effect the day before leave without pay begins. For purposes of this section, "leave-without-pay status" includes unpaid leave taken in accordance with the Family and Medical Leave Act of 1993 or other applicable law.

(b) Individuals who were placed on leave-without-pay status by a participating entity in accordance with that employer's personnel policies or applicable law prior to the date the employer became a participating entity may enroll in the TRS-ActiveCare program in accordance with §41.36 of this title (relating to Enrollment Periods for the TRS-ActiveCare Program) if they were covered by the participating entity's health coverage plan on the day before the employer became a participating entity and provided they would meet eligibility requirements under §41.34 of this title (relating to Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program) but for their leave-without-pay status.

(c) Individuals who were placed on leave-without-pay status by a participating entity in accordance with that employer's personnel policies or applicable law prior to the date the employer became a participating entity, but who were not covered by the participating entity's health coverage plan on the day before the employer became a participating entity, may enroll in the TRS-ActiveCare program in accordance with §41.36 of this title when they return to work and provided they meet eligibility requirements under §41.34 of this title.

(d) Unless otherwise required by applicable law, continued coverage for an individual described in subsection (a) or (b) of this section shall terminate the earlier of:

(1) 11:59 p.m. Central Time on the last calendar day of the month for which premiums are paid;

(2) 11:59 p.m. Central Time on the last calendar day of the month in which the employment of the covered individual, or the individual under whom a dependent qualified for coverage, terminates

as determined by the participating entity, except as otherwise provided under §41.39 of this title (relating to Coverage for Individuals Changing Employers);

(3) 11:59 p.m. Central Time on the last calendar day of the month in which a covered individual, or the individual under whom a dependent qualified for coverage, is no longer eligible for coverage under the TRS-ActiveCare Program under §41.34 of this title due to requirements unrelated to leave-without-pay status; or

(4) 11:59 p.m. Central Time on the last calendar day of the sixth month following the month in which coverage continuation under this section began for either the covered individual, or for the individual under whom a dependent qualified for coverage.

§41.44. Payment of Additional Support for Certain School Districts Paying Social Security Taxes.

A school district eligible for additional support payments under Insurance Code article 3.50-9 §6 ("Eligible District") must notify TRS in writing by September 1, 2002 of its eligibility for the payments. The Eligible District must submit a quarterly statement to TRS in the form prescribed by TRS reflecting the taxes paid by the Eligible District under Section 3111(a), Internal Revenue Code of 1986, on the portion of the $1000 supplement received by individuals employed by the Eligible District as compensation during the applicable quarter. Such statements shall be submitted to TRS beginning with the calendar quarter ending November 30, 2002 and must be submitted on or after the first day, and no later than the last day, of the month following the applicable quarter. To the extent amounts appropriated for this purpose are available, TRS will generally remit amounts payable under Insurance Code article 3.50-9 §6 to the Eligible District within 30 days after receipt of a quarterly statement submitted in accordance with this section if TRS does not seek verification of, or otherwise dispute, information on the statement. TRS may dispute, or seek verification of, information on any quarterly statement at any time. An Eligible District will consider the $1000 supplement to be the last compensation received by an individual in a calendar year with regard to the social security wage base. An Eligible District may not include any amount that exceeds, or will exceed, the social security wage base in its calculations of taxes paid. In the event cumulative statements submitted by all Eligible Districts for reimbursement exceed the amount appropriated for this purpose, TRS will make payments based on its calculation of an Eligible District's proportional share of the remaining available amount. TRS may make any appropriate increase or decrease in funds that would otherwise be payable to an Eligible District. If necessary, TRS may institute other action to recover amounts an Eligible District was not entitled to receive.

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

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

TRD-200204596
Charles L. Dunlap
Executive Director
Teacher Retirement System of Texas
Effective Date: July 25, 2002
Expiration Date: November 22, 2002
For further information, please call: (512) 542-6115

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PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

The Office of the Attorney General (OAG) proposes the repeal of 1 TAC Chapter 55, Subchapter G Contracts and Audits, §§55.151, 55.153, 55.154, 55.155, 55.156 and 55.157 concerning contracts and audits and proposes new Subchapter G, Authorized Costs and Fees in IV-D cases §§55.151, 55.152 and 55.153 concerning court costs.

After reviewing §§55.151, 55.153, 55.154, 55.155, 55.156 and 55.157, the OAG has determined that these sections no longer reflect current law and business practices and therefore should be repealed. The OAG proposes new §§55.151, 55.152 and 55.153.

Section 55.151 describes costs and fees in IV-D cases the court may charge the Office of the Attorney General. Section 55.152 describes the billing process. Section 55.153 describes monitoring processes by the Office of the Attorney General.

Cynthia Bryant, IV-D Director, Child Support Division, has determined that for the first five year period there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rules.

Ms. Bryant also has also determined that for the first five year period that the proposed rules are in effect the anticipated public benefit is to simplify and clarify the court cost process.

Ms. Bryant also has determined that the proposed rules will not have an adverse economic effect on small businesses because the proposed rules imposes no additional burden on anyone. There is no anticipated economic cost to persons who are required to comply with the new sections as proposed.

Comments may be submitted, in writing no later than 30 days from the date of publication of these rules to Kathy Shafer, Child Support Division, General Counsel section, Office of the Attorney General, (physical address) 5500 East Oltorf, Austin, Texas 78741, or (mailing address) P. O. Box 12017, Austin, Texas 78711-2017, mail code 039, phone number (512) 460-6134.

SUBCHAPTER G. CONTRACTS AND AUDITS

1 TAC §§55.151, 55.153 - 55.157

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

The repeal of these sections is proposed under Texas Family Code §231.002.

The repeal affects Texas Family Code, Chapter 110 and Chapter 231.

§55.151. County Responsibilities.

§55.153. Federal Financial Participation--Allowable Costs.

§55.154. Miscellaneous Requirements--Allowable Costs.

§55.155. Handling a Contract Unit's Noncompliance.

§55.156. Audits.

§55.157. Federal Audits.

This 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 July 26, 2002.

TRD-200204714
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Earliest possible date of adoption: September 8, 2002
For information regarding this publication, please contact A.G. Younger, Agency Liaison, at (512) 463-2110.

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SUBCHAPTER G. AUTHORIZED COSTS AND FEES IN IV-D CASES

1 TAC §§55.151 - 55.153

The new rules are proposed under Texas Family Code 231.002.

The new rules affect Texas Family Code Chapter 110, §§231.202, 231.204, 231.205 and Texas Government Code §§51.317, 51.318 and 51.319.

§55.151. Authorized Costs and Fees in IV-D Cases.

The clerk of the court may charge the Office of the Attorney General the following costs and fees in IV-D cases:

(1) filing fees and fees for issuance and service of process as provided by Chapter 110 of the Texas Family Code and by Sections 51.317, 51.318(b)(2), and 51.319(2), Texas Government Code;

(2) fees for transfer as provided by Chapter 110 of the Texas Family Code;

(3) fees for the issuance and delivery of orders and writs of income withholding in the amounts provided by Chapter 110 of the Texas Family Code;

(4) a fee of $45 for each item of process to each individual on whom service is required, including service by certified or registered mail, to be paid to a sheriff, constable, or clerk whenever service of process is required; and

(5) a reasonable fee not to exceed $15 for filing an original administrative writ of withholding with an effective date after September 1, 2001. A fee cannot be charged for duplicate copies of an administrative writ of withholding.

§55.152. Billing for Costs and Fees in IV-D Cases.

Each county may bill the Office of the Attorney General monthly for fees and costs not previously billed. The county must credit the Office of the Attorney General each month for amounts reimbursed to the County by the parties during the preceding thirty (30) days. Monthly reimbursement requests should be submitted electronically or mailed using the IV-D Child Support Court Costs Processing Form provided by the Office of the Attorney General.

§55.153. Monitoring and Auditing for Costs and Fees in IV-D Cases.

The Office of the Attorney General may monitor and conduct, at reasonable times, fiscal and/or program audits of county performance in assessing and billing for costs and fees in IV-D cases. A county must grant the Office of the Attorney General access, without prior notice, to all books and records of the county pertinent to the audit. County records relating to costs and fees in IV-D cases may be inspected, monitored, evaluated, audited or copied by the Office of the Attorney General.

This 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 July 26, 2002.

TRD-200204715

Susan D. Gusky

Assistant Attorney General

Office of the Attorney General

Earliest possible date of adoption: September 8, 2002

For information regarding this publication, please contact A.G. Younger, Agency Liaison, at (512) 463-2110.

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PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS
SUBCHAPTER C. VOTING SYSTEMS

1 TAC §81.52

The Office of the Secretary of State, Elections Division, proposes an amendment to §81.52, concerning procedures for precinct ballot counters. The amendment is proposed to authorize direct deposit of ballots to precinct ballot counters during early voting and adds subsection (h) to §81.52.

Ann McGeehan, Director of Elections, has determined that for the first five-year period that this rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Ms. McGeehan has determined also that for each year of the first five years that the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to reduce early voting ballot board time and costs by allowing direct deposit into precinct ballot counters. Currently, voters are not allowed to deposit ballots into precinct ballot counters during early voting by personal appearance, which requires the ballot board to spend a significant amount of its time on election day running ballots cast in person during the early voting period. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Ann McGeehan, Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The amendment is proposed under the Code, Chapter 31, Subchapter A, §31.003, which provides the Secretary of State with authority to promulgate rules to obtain uniformity in the interpretation and application of the Code, and under the Code, Chapter 122, §122.001(c), which authorizes the Secretary of State to prescribe additional standards for voting systems.

The Code, Chapter 122, is affected by this proposed amendment.

§81.52. Precinct Ballot Counters.

(a) - (g) (No change.)

(h) If a precinct ballot counter is to be used during early voting by personal appearance, a continuous feed audit log printer must remain attached to the precinct counter throughout the early voting period. In addition, the counter must be secured to prevent tampering by the following procedure.

(1) Immediately prior to the opening of the polls on the first day of early voting by personal appearance, a zero tape shall be run. If the tape properly reads "0" for all candidates and propositions, voting may begin.

(2) At the close of each day's voting, the precinct counter's doors must be locked and sealed with a numbered paper seal. The precinct counter must be unplugged and secured for the evening.

(3) Prior to voting on each day of the period, the precinct counter must be plugged back in and a tape run to indicate that the

counter has not been disturbed since the previous day's voting and that voting may continue.

(4) At the conclusion of early voting by personal appearance, the precinct counter shall be locked, sealed, and secured by the Early Voting Clerk until Election Day.

(5) At the proper time designated for tabulation, the paper seal must be inspected to determine that it is intact. The audit log must also be inspected to determine that there has been no unauthorized access to the precinct counter.

(6) If the seal is intact and the log appears in order, the seal should be broken and the ballots removed to a separate container. The polls are closed on the counter and a "totals" printout is printed. The prom pack should be removed and transferred to the accumulator.

(7) If the seal is not intact, the early voting results may not be used and the early voting ballots must be re-counted using the standard election day procedure.

(8) If the audit log indicates unauthorized activity, the early voting results may not be used and the early voting ballots must be re-counted using the standard election day procedure.

(9) After the final totals have been printed, the third test must be run on the precinct counter.

(10) The Early Voting Clerk shall place a notice on the bulletin board of the hour and location of the seal breaks and running of totals.

(11) The audit log shall be preserved for 60 days after election day, or 22 months following election day in an election involving a federal office.

(12) Any deviation from this procedure must be approved in writing by the Secretary of 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 July 30, 2002.

TRD-200204846
David Roberts
General Counsel
Office of the Secretary of State
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-5561

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SUBCHAPTER D. VOTING SYSTEMS CERTIFICATION

1 TAC §81.60

The Office of the Secretary of State, Elections Division, proposes an amendment to §81.60, concerning voting system examinations to shorten the amount of time examiners have to submit their reports and to change one of the examination dates.

Ann McGeehan, Director of Elections, has determined that for the first five-year period the amended rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. McGeehan has determined that for the first five-year period the amended rule is in effect the public benefits expected as a result of adoption of the amended rule will be to give voting system vendors more time to review examination results and re-submit their systems with appropriate changes before the deadline of the next scheduled voting system exam. There will be no effect on small businesses or micro-businesses. There will be no anticipated economic cost to the state or local governments.

Comments on the proposal may be submitted to the Office of the Secretary of State, Ann McGeehan, Director of Elections, P.O. Box 12060, Austin, Texas 78711.

The amendment is proposed under the Texas Election Code, §31.003, which provides the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election laws.

Election Code §122.001 is affected by this rule.

§81.60. Voting System Certification Procedures.

In addition to the procedures prescribed by the Texas Election Code, Chapter 122 [~~1322~~], compliance with the following procedures is required for certification of a voting system.

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

(4) Certification examinations will be scheduled by the secretary of state three times a year during the months of January, May, and August [~~September~~], unless extenuating circumstances provide otherwise.

(5) - (8) (No change.)

(9) Each examiner must submit a written report to the secretary of state stating his or her findings for each voting system no later than the 30th [~~45th~~] day after examination.

(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.

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

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David Roberts
General Counsel
Office of the Secretary of State
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-5561

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PART 8. TEXAS JUDICIAL COUNCIL

CHAPTER 173. INDIGENT DEFENSE

The Task Force on Indigent Defense (Task Force) is a permanent Standing Committee of the Texas Judicial Council. The Task Force proposes new §§173.1 - 173.8, 173.101 - 173.104, 173.201, 173.202, 173.301 - 173.312, 173.401, 173.402, concerning the administration of grants to counties. The new sections are proposed to establish the guidelines for the administration of a new grant program for counties to improve indigent defense services. These sections set forth the general terms, conditions, criteria, and funding formula for awarding these grants. Grants will aid counties to maintain, improve, and enhance the

delivery of indigent defense services, and will promote compliance by counties with the requirements of state law and Task Force policies and standards relating to indigent defense.

Jim Bethke, Director, has determined that for the first five-year period the new rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the new sections.

Mr. Bethke has also determined that for each of the first five-year period the rules are in effect the public benefit will be an improvement in the indigent defense services provided by counties because of the grants awarded under the proposed rules. Mr. Bethke has determined that there will be no economic costs to persons who are required to comply with the new sections.

Comments on the proposed new rules may be submitted to Wesley Shackelford, Special Counsel, Task Force on Indigent Defense, P.O. Box 12066, Austin, Texas 78711-2066 no later than 30 days from the date that these proposed rules are published in the *Texas Register*.

SUBCHAPTER A. GENERAL GRANT PROGRAM PROVISIONS

1 TAC §§173.1 - 173.8

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

No other statutes, articles, or codes are affected by the proposed new rules.

§173.1. Applicability.

(a) The Texas Legislature authorized the Task Force on Indigent Defense (Task Force) to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services. It further authorized the Task Force to monitor grants and enforce compliance with grant terms. Subchapters A through E of this chapter apply to Indigent Defense grants to counties awarded by the Task Force. Subchapter A covers the general provisions for grant funding. Subchapter B addresses eligibility, grant funding, and expenditure reporting. Subchapter C provides rules detailing the conditions the Task Force on Indigent Defense may place on grants. Subchapter D sets out the rules related to administering grants. Subchapter E specifies rules regarding program monitoring and audits.

(b) All counties in Texas are eligible to participate in this program.

§173.2. Definitions.

The following words and terms, when used in this chapter, will have the following meanings, unless otherwise indicated:

(1) "Applicant" is a county that has submitted a grant application or grant renewal documentation.

(2) "Crime" means:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(3) "Defendant" means a person accused of a crime or a juvenile offense.

(4) "Discretionary Grant" means funding approved for a specific program designed to improve the quality of indigent defense services.

(5) "Fair Defense Account" is an account in the general revenue fund that may be appropriated only to the Task Force on Indigent Defense for the purpose of implementing the Texas Fair Defense Act.

(6) "Formula Grant" means funding allocated to counties in a fair manner through a formula based upon population figures or other criteria approved by the Task Force.

(7) "Juvenile offense" means conduct committed by a person while younger than 17 years of age that constitutes:

(A) a misdemeanor punishable by confinement; or

(B) a felony.

(8) "Schedule of fees" means a list of the fees adopted by formal action of the judges of the county courts, statutory county courts, and district courts trying criminal cases in each county. Each fee schedule adopted will state reasonable fixed rates or minimum and maximum hourly rates, taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates, and will provide a form for the appointed counsel to itemize the types of services performed.. An attorney appointed to represent the interests of a child in a juvenile proceeding will be paid in accordance with the same schedule.

(9) "Special condition" means a condition placed on a grant because of a need for information, clarification, or submission of an outstanding requirement of the grant.

(10) "Task Force on Indigent Defense" (Task Force) is the governmental entity charged with developing policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in post-conviction proceedings. The Task Force will:

(A) provide technical support to:

(i) assist counties in improving their indigent defense systems; and

(ii) promote compliance by counties with the requirements of state law relating to indigent defense;

(B) direct the Comptroller to distribute funds, including grants, to counties to provide indigent defense services in the county; and

(C) monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant, including enforcement by directing the Comptroller to:

(i) withdraw grant funds; or

(ii) require reimbursement of grant funds by the county.

(11) "UGMS" means the Uniform Grant Management Standards promulgated by the Governor's Office of Budget and Planning at 1 TAC, §5.141 - 5.167.

§173.3. Grant Submission Process.

(a) Requests for applications. The Task Force will provide written notice to each county judge of Requests for Applications (RFA) for Indigent Defense grants. Applicants applying pursuant to an RFA

must submit their applications according to the requirements provided in the RFA. The RFA will provide the following:

(1) information regarding deadlines for the submission of applications;

(2) the maximum and minimum amounts of funding available for a grant, if applicable;

(3) the starting and ending dates for grants;

(4) information regarding how applicants may obtain application kits; and

(5) information regarding where applicants must submit applications.

(b) Out-of-Cycle Grants. The Task Force may also consider applications for out-of-cycle grants that have not been submitted pursuant to an RFA. Applicants must submit such applications in accordance with the Task Force-provided guidelines for non-scheduled grants, and will be selected in accordance with §173.4(b) of this chapter.

§173.4. Selection Process.

(a) The Task Force or its designees will review grant applications and shall make grant awards from the Fair Defense Account for formula grants, discretionary grants, or out-of-cycle grants.

(b) For out-of-cycle applications submitted pursuant to §173.3(b), the Task Force or its designees will decide whether to fund the application based upon the following factors:

(1) the inherent value of the project's impact;

(2) whether the project has the potential to be a model program; or

(3) whether delaying the application would have a significant negative impact on the immediate need for the project.

(c) Decisions by the Task Force or its designees regarding requests to purchase equipment using grant funds will be made based on the availability of funds, whether the grantee has demonstrated that the requested equipment is necessary and essential to the successful operation of the grant project, and if the equipment is reasonable in cost. Unless otherwise provided, equipment purchased is the property of the county.

(d) During the staff review of an application, the staff may request that the applicant submit additional information necessary to complete grant review. The staff may request the applicant to provide any outstanding forms and documents to clarify or justify any part of the application. The applicant must provide a response by the established deadline. Such requests for information, including the issuance of a preliminary review report, do not mean that the Task Force will fund an application.

(e) The Task Force will inform applicants of funding decisions on their grant applications through either a Statement of Grant Award or a notification of denial.

(f) Except as provided by law, all grant funding decisions made by the Task Force or its designees are final and are not subject to appeal.

§173.5. Grant Funding Decisions.

(a) The Task Force or its designees will render decisions on applications for funding through the use of objective tools and comparative analysis. The Task Force or its designees will first determine whether the grantee is eligible for funds in accordance with §173.1 of this title (relating to "Applicability") and §173.101 of this title (relating to "Eligibility").

(b) All decisions to fund grant requests rest completely within the discretionary authority of the Task Force or its designees. The receipt of an application for grant funding does not obligate the Task Force to fund the grant.

(c) The Task Force makes no commitment that a grant, once funded, will receive priority consideration for subsequent funding.

§173.6. Grant Acceptance.

Each applicant must accept or reject a grant award within 30 days of the date upon which the Task Force issues a Statement of Grant Award. The Director of the Task Force may alter this deadline upon request from the applicant. The authorized official designated under §173.301 of this chapter (relating to "Grant Officials") must formally accept the grant in writing before the grantee may receive any grant funds.

§173.7. Adoptions by Reference.

(a) Grantees must comply with all applicable state statutes, rules, regulations, and guidelines.

(b) The Task Force adopts by reference the rules, documents, and forms listed below that relate to the administration of grants.

(1) Uniform Grant Management Standards (UGMS) adopted pursuant to the Uniform Grant and Contract Management Act of 1981, Chapter 783, Texas Government Code. See 1 TAC §§5.141 - 5.167.

(2) The Task Force forms, including the statement of grant award, grant adjustment notice, grantee's progress report, financial expenditure report, and property inventory report.

§173.8. Use of the Internet.

The Task Force may require submission of grant applications, progress reports, financial reports, and other information via the Internet. Completion and submission of a progress report or financial report via the Internet meets the relevant requirements contained within this chapter for submitting reports in writing. If a grant application is submitted via the Internet, the Task Force will not consider it complete until the grantee provides an Internet Submission Form that is signed by the applicant's authorized official and that meets all relevant deadlines for applications. This form certifies that the information submitted via the Internet is true and correct and that, if a grant is awarded, the grantee will abide by all relevant rules, policies, and procedures. The Director of the Task Force may grant a county a waiver of Internet submission requirements for good cause shown.

This 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 July 26, 2002.

TRD-200204662
Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
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For further information, please call: (512) 936-6994

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SUBCHAPTER B. ELIGIBILITY AND GRANT FUNDING REQUIREMENTS

1 TAC §§173.101 - 173.104

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

No other statutes, articles, or codes are affected by the proposed new rules.

§173.101. Eligibility.

The Task Force may provide grants from the Fair Defense Account to counties providing legal representation and indigent defense support services. Grants provided under this chapter may be used by counties for:

(1) Attorney fees for indigent defendants accused of crimes or juvenile offenses;

(2) Expenses for licensed investigators, experts, forensic specialists, or mental health experts related to the criminal defense of indigent defendants; and

(3) Other approved expenses allowed by the grant application kit or necessary for the operation of a funded program.

§173.102. Grant Funding.

(a) The Task Force or its designees are not obligated to fund budget items in grant applications at the amounts requested by the applicant. The Task Force will make decisions regarding funding in accordance with §173.4 of this chapter (relating to "Selection Process "), subject to the availability of funds.

(b) The applicant may not reduce the amount of funds expended for indigent defense services in the county because of funds provided for by the Task Force under this grant.

§173.103. Expenditure Categories.

(a) Allowable expenditure categories and any necessary definitions will be provided to the applicant as part of the grant application kit.

(b) Expenditures may be allocated to the grant in accordance with the Uniform Grant Management Standards.

§173.104. Program Income.

(a) Rules governing the use of program income are included in the provisions of the Uniform Grant Management Standards adopted by reference in §173.7 of this chapter (relating to "Adoptions by Reference").

(b) Grantees must use program income to supplement program costs or reduce program costs. Program income may only be used for allowable program costs.

This 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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Jim Bethke

Director, Task Force on Indigent Defense

Texas Judicial Council

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For further information, please call: (512) 936-6994

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SUBCHAPTER C. CONDITIONS OF GRANT FUNDING

1 TAC §173.201, §173.202

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

No other statutes, articles, or codes are affected by the proposed new rules.

§173.201. Grant Conditions.

(a) Applicants must apply for funds using the procedures, forms, and certifications prescribed by the Task Force. When the Task Force determines that a grantee has failed to submit the necessary information or has failed to comply with any Task Force rule or other relevant statute, rule, or requirement, the Task Force may place a special condition on the grant. The special condition allows the Task Force to place a grantee's funds on hold until the grantee has satisfied the requirements of the special condition. If a special condition is not corrected or removed within 45 days, the Task Force may reject the application and deny the grant.

(b) Grantees must comply with the applicable grant management standards adopted under §173.7 of this chapter (relating to "Adoptions by Reference").

§173.202. Resolutions.

Each application must include a resolution from the county commissioners' court that contains the following:

(1) authorization for the submission of the application to the Task Force;

(2) provision giving the authorized official the power to apply for, accept, decline, modify, or cancel the grant; and

(3) a written assurance that, in the event of loss or misuse of Fair Defense Account funds, the governing body will return all funds as required by the Task Force.

This 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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Jim Bethke

Director, Task Force on Indigent Defense

Texas Judicial Council

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SUBCHAPTER D. ADMINISTERING GRANTS

1 TAC §§173.301 - 173.312

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

No other statutes, articles, or codes are affected by the proposed new rules.

§173.301. Grant Officials.

(a) Each grant must have the following designated to serve as grant officials:

(1) Program director. This person must be the officer or employee responsible for program operation or monitoring or implementation of the indigent defense plan and who will serve as the point-of-contact regarding the program's day-to-day operations.

(2) Financial officer. This person must be the county auditor or county treasurer if the county does not have a county auditor.

(3) Authorized official. This person must be authorized to apply for, accept, decline, modify, or cancel the grant for the applicant county. A county judge or a designee authorized by the governing body in its resolution may serve as the authorized official.

(b) The program director and the authorized official may be the same person. The financial officer may not serve as the program director or the authorized official.

§173.302. Obligating Funds.

The grantee may not obligate grant funds before the beginning or after the end of the grant period.

§173.303. Retention of Records.

(a) Grantees must maintain all financial records, supporting documents, statistical records, and all other records pertinent to the award for at least three years following the closure of the most recent audit report or submission of the final expenditure report. Records retention is required for the purposes of state examination and audit. Grantees may retain records in an electronic format. All records are subject to audit or monitoring during the entire retention period.

(b) Grantees must retain records for equipment, non-expendable personal property, and real property for a period of three years from the date of the item's disposition, replacement, or transfer.

(c) If any litigation, claim, or audit is started before the expiration of the three-year records retention period, the grantee must retain the records under review until the resolution of all litigation, claims, or audit findings.

§173.304. Expenditure Reports.

(a) Each grantee county must submit Grant Expenditure Reports to the Task Force. The Task Force will provide the appropriate forms and instructions for the reports along with deadlines for their submission. The grantee's financial officer must sign and submit the expenditure reports. The Task Force may place a financial hold on a grantee's future funds if the grantee fails to submit timely expenditure reports.

(b) Grantees must ensure that actual expenditures are adequately documented. Documentation may include, but is not limited to, ledgers, purchase orders, travel records, time sheets or other payroll documentation, invoices, contracts, mileage records, telephone bills and other documentation that verifies the expenditure amount and appropriateness to the grant.

§173.305. Inventory Reports.

The Task Force requires each grantee to maintain an inventory report of all equipment purchased with grant funds. This report must comport with the final financial expenditure report. At least once each year, grantees must complete a physical inventory of all grantee property and the grantee must reconcile the results with the existing property records.

§173.306. Provision of Funds.

After a grant has been accepted and if there are no outstanding special conditions or other deficiencies, the Task Force may forward funds to the grantee. Funds will be disbursed to the grantee no more often than quarterly. Disbursement of funds is always subject to the availability of funds.

§173.307. Discretionary Grant Adjustments.

(a) The authorized official must sign all requests for grant adjustments.

(b) Budget Adjustments. Grant adjustments consisting of reallocations of funds among or within budget categories in excess of ten percent of the original budget line item transferred to or from are considered budget adjustments, and are allowable only with prior approval of the Director of the Task Force.

(c) Non-Budget Grant Adjustments. The following rules apply to non-budget grant adjustments:

(1) Requests to revise the scope, target, or focus of the project, or alter project activities require advance written approval from the Task Force or its designees, as determined by the Director of the Task Force.

(2) The grantee will notify the Task Force or its designees in writing of any change in the designated program director, financial officer, or authorized official within ten days following the change. When the notice addresses a change of financial officer, the letter must include a sample signature of the new official. When the notice addresses a change of authorized official, the commissioners' court must submit the request.

(3) A grantee may submit a written request for a grant extension in extraordinary circumstances. The Task Force must receive requests for grant extensions at least 30 days prior to the end of the grant period.

§173.308. Remedies for Noncompliance.

If a grantee fails to comply with any term or condition of a grant, the Task Force may take one or more of the following actions:

(1) disallow all or part of the cost of the activity or action that is not in compliance and seek a return of the cost;

(2) impose administrative sanctions, other than fines, on the grantee;

(3) temporarily withhold all grant payments pending correction of the deficiency by the grantee;

(4) withhold future grants from the program or grantee; or

(5) terminate the grant in whole or in part.

§173.309. Grant Termination.

(a) The grant will terminate at the end of the date specified in the grant award, unless an extension is granted in accordance with §173.307(c)(3).

(b) If a grantee wishes to terminate a grant in whole or in part before the end of the grant period, the grantee must notify the Task Force in writing. The Task Force or its designee will make arrangements with the grantee for the early termination of the grant.

(c) The Task Force may terminate any grant, in whole or in part, when:

(1) a grantee fails to comply with any term or condition of the grant or the grantee has failed to comply with any applicable rule;

(2) the grantee and the Director of the Task Force agree to do so;

(3) grant funds are no longer available; or

(4) conditions exist that make it unlikely that grant or program objectives will be accomplished.

§173.310. Violations of Laws.

If the grantee has a reasonable belief that a criminal violation may have occurred in connection with Fair Defense Account grant funds, including the misappropriation of funds, fraud, theft, embezzlement, forgery, or any other serious irregularities indicating noncompliance with grant requirements, the grantee must immediately notify the Task Force in writing of the suspected violation or irregularity. The grantee may also notify the local prosecutor's office of any possible criminal violations. Grantees whose programs or personnel become involved in any litigation arising from the grant, whether civil or criminal, must immediately notify the Task Force and forward a copy of any demand notices, lawsuits, or indictments to the Task Force.

§173.311. Grant Progress Reports.

Each grantee must submit reports regarding grant information, performance, and progress towards goals and objectives in accordance with the instructions provided by the Task Force or its designee. To remain eligible for funding, the grantee must be able to show the scope of services provided and the impact and quality of those services.

§173.312. Grant Management.

The Task Force has oversight responsibility for the grants it awards. The Task Force or its designee may review the grantee's management and administration of grant funds at any time, and may also request records in accordance with record retention requirements found in §173.303 of this chapter (relating to "Retention 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.

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Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
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SUBCHAPTER E. PROGRAM MONITORING AND AUDITS

1 TAC §173.401, §173.402

The new rules are proposed under the Texas Government Code §71.062. The Task Force is authorized to direct the Comptroller to distribute Fair Defense Account funds, including grants, to counties for indigent defense services under the Texas Government Code §71.062. This section further authorizes the Task Force to monitor grants and enforce compliance with grant terms and to develop policies to ensure funds are allocated and distributed to counties in a fair manner. The Task Force interprets §71.062(c) to require the Task Force to adopt rules governing the process for distributing grant funds.

No other statutes, articles, or codes are affected by the proposed new rules.

§173.401. Monitoring.

(a) The Task Force or its designees will monitor the activities of grantees as necessary to ensure that grant funds are used for authorized purposes in compliance with laws, regulations, and the provisions of grant agreements.

(b) The monitoring program may consist of formal audits, monitoring reviews, and technical assistance. The Task Force or its designees may implement monitoring through on-site review at the grantee location or through a desk review based on grantee reports. In addition, the Task Force or its designees may request grantees to submit relevant information to the Task Force, pursuant to §173.312 of this chapter (relating to "Grant Management"), to support any monitoring review. The monitoring program may include work performed by the Task Force staff, Task Force contractors, or other external reviewers.

(c) Grantees must make available to the Task Force or its designees all requested records relevant to a monitoring review. The Task Force or its designees may make unannounced monitoring visits at any time. Failure to provide adequate documentation upon request may result in disallowed costs or other remedies for noncompliance as detailed under §173.308 of this chapter (relating to "Remedies for Noncompliance").

(d) After a monitoring review, the grantee will be notified in writing of any noncompliance identified by the Task Force or its designees in the form of a draft report.

(e) The grantee will respond to the draft report and the deficiencies, if any, and submit a plan of corrective action, if necessary, within a time frame specified by the Task Force or its designees.

(f) The corrective action plan will include the:

(1) titles of the persons responsible for implementing the corrective action plan;

(2) corrective action to be taken; and

(3) anticipated completion date.

(g) If the grantee believes corrective action is not required for a noted deficiency, the response will include an explanation, specific reasons, and supporting documentation.

(h) The Task Force or its designees will approve the corrective action plan and may require modifications prior to approval. The grantee's replies and the approved corrective action plan, if any, will become part of the final report.

(i) The grantee will correct deficiencies identified in the final report within the time frame specified in the corrective action plan.

§173.402. Audits Not Performed by The Task Force on Indigent Defense.

(a) Grantees must submit to the Task Force copies of the results of any single audit conducted in accordance with the State Single Audit Circular issued under the Uniform Grant Management Standards. Grantees must ensure that single audit results, including the grantee's response and corrective action plan, if applicable, are submitted to the Task Force within 30 days after grantee receipt of the audit results or nine months after the end of the audit period, whichever is earlier.

(b) All other audits performed by auditors independent of the Task Force must be maintained at the grantee's administrative offices pursuant to §173.303 of this chapter (relating to "Retention of Records") and be made available upon request by the Task Force or its representatives. Grantees must notify the Task Force of any audit results that may adversely impact the Task Force grant funds.

(c) Nothing in this section should be construed so as to require a special or program-specific audit of a grantee's Indigent Defense grant program.

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

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Jim Bethke
Director, Task Force on Indigent Defense
Texas Judicial Council
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For further information, please call: (512) 936-6994

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.110

The Texas Health and Human Services Commission (HHSC) proposes to amend §355.110, concerning informal reviews and formal appeals, in its Medicaid Reimbursement Rates chapter. The purpose of the amendment is to remove references to the Texas Department of Human Services (DHS), since HHSC now performs rate analysis functions for DHS. The amendment also lengthens from 20 to 30 calendar days the time frame in which an interested party must submit a request for an informal review, specifies the deadline for receipt of informal review requests, and stipulates that the request for an informal review must be signed by an individual legally responsible for the conduct of the interested party. The deadline by which additional information must be received, if HHSC Rate Analysis staff request additional information, is clarified to take into account weekend days, state holidays, and national holidays. Additionally, the amendment specifies the deadline by which the DHS Hearings Department must receive a request for a formal appeal; corrects rule citations regarding formal appeals in §355.110(a)(1) and (d); and notes that if an informal review request is rejected for failure to meet the due date and signatory requirements, then the interested party cannot make a formal appeal.

DHS is proposing related policy in its Chapter 20 in this issue of the *Texas Register*.

Don Green, Chief Financial Officer, has determined that, for the first five-year period the proposed section will be in effect, there will be no fiscal implications for state government or local government as a result of enforcing or administering the section.

Steve Lorenzen, Director, Rate Analysis, 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 better provider compliance with the informal review and administrative appeal processes regarding cost reports and enhancement/accountability reports. Since the amendment seeks to clarify these processes to make the deadlines and other requirements as precise as possible, providers can more easily comply with the rules. There will be no effect on small or micro businesses as a result of enforcing or administering the section, because the amendment simply clarifies for contracted providers the informal review and administrative appeals processes for cost reports and enhancement/accountability reports, without adding any new requirements. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by this section.

Under §2007.003(b) of the Texas Government Code, HHSC has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, HHSC is not required to complete a takings impact assessment regarding these rules.

Questions about the content of this proposal may be directed to Nancy Kimble at (512) 438-4051 in HHSC Rate Analysis for Long Term Care--Aged and Disabled. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-247, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*. For further information regarding the proposal or to make the proposal available for public review, contact local offices of DHS or Nancy Kimble at (512) 438-4051 in HHSC Rate Analysis.

The amendment is proposed under the Texas Government Code, §531.033, which authorizes the commissioner of HHSC to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes the commission as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code.

The amendment implements the Government Code, §531.033 and §531.021(b).

§355.110. Informal Reviews and Formal Appeals.

(a) General provisions.

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

(A) Formal appeal--An administrative hearing requested by an interested party under subsection (d) of this section and conducted in accordance with procedures described at 40 TAC §§79.1601 - 79.1610 [~~79.1614~~] (relating to Formal Appeals);

(B) Informal review--The informal reexamination of an action or determination by the Texas Health and [~~Department of~~] Human Services Commission (HHSC [~~DHS~~]) under this chapter requested by an interested party and conducted in accordance with subsection (c) of this section.

(C) Interested party--A Texas Department of Human Services (DHS)-contracted provider.

(2) (No change.)

(3) Subject matter of informal reviews and formal appeals. An interested party may request an informal review or formal appeal regarding an [~~a DHS~~] action or determination under §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), and §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures), or program-specific allowable or unallowable costs, taken specifically in regard to the interested party.

(b) Separation of informal reviews and formal appeals from the reimbursement determination process.

(1) The filing of a request for an informal review or formal appeal under this section does not stay or delay implementation of reimbursement adopted by HHSC [~~DHS~~] in accordance with the requirements of this chapter.

(2) Closure of cost report databases used in the reimbursement determination process and application of results of pending review or appeal. To facilitate the timely and efficient calculation of reimbursement amounts, HHSC [~~DHS~~] closes cost report databases used in the reimbursement determination process prior to the proposal of reimbursement amounts.

(A) - (C) (No change.)

(c) Informal review.

(1) An interested party who disputes an [~~a DHS~~] action or determination under this chapter may request an informal review under this section. The purpose of an informal review is to provide for the informal and efficient resolution of the matters in dispute. An informal review is not a formal administrative hearing, but is a prerequisite to obtaining a formal administrative hearing and is conducted according to the following procedures:

(A) HHSC Rate Analysis must receive a written request for an informal review by hand delivery, [~~The interested party must contact the Rate Analysis Department in writing by~~] U.S. mail, or special mail delivery no later than 30 [~~within 20~~] calendar days from [~~of~~] the date on the [~~DHS's~~] written notification of the [~~exclusions or~~] adjustments [~~to request an informal review~~]. If the 30th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 30th calendar day is the final day the receipt of the written request will be accepted. A request for an informal review that is not received by the stated deadline will not be accepted.

(B) (No change.)

(C) The written request must be signed by an individual legally responsible for the conduct of the interested party, such as the sole proprietor, a partner, a corporate officer, an association officer, a governmental official, a limited liability company member, a person authorized by the applicable DHS Form 2031 for the interested party on file at the time of the request, or a legal representative for the interested party. The administrator or director of the facility or program is not authorized to sign the request unless the administrator or director holds one of these positions. A request for an informal review that is not signed by an individual legally responsible for the conduct of the interested party will not be accepted.

(2) On receipt of a request for informal review:[~~, the commissioner or his designee assigns the review to appropriate DHS staff.~~]

(A) The lead staff member coordinates the [~~a~~] review [~~by appropriate DHS staff~~] of the information submitted by the interested party. Staff may request additional information from the interested party, which must be received in writing by the lead staff member no later than [~~within~~] 14 calendar days from the date [~~of~~] the interested party receives the written request for additional information. If the 14th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 14th calendar day is the final day the receipt of the additional information will be accepted. Information received after 14 calendar days may not be used in the panel's written decision unless the interested party receives written approval of the lead [~~DHS~~] staff member to submit the information after 14 calendar days.

(B) Within 30 calendar days of the date a written [~~the~~] request for informal review that complies with paragraphs (1) and (2) of this subsection is received [~~by DHS~~] or the date additional requested information is due or received [~~by DHS~~], whichever is sooner, the lead staff member will [~~must~~] send the interested party its written decision by certified mail, return receipt requested. If the 30th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 30th calendar day is the final day by which the written decision must be sent.

(d) Administrative hearings. An interested party who disagrees with the results of an informal review conducted under subsection (c) of this section may file a formal appeal of the review. The [~~interested party must file a written request for a formal appeal with the~~] Hearings Department of the[~~,~~] Texas Department of Human Services, Mail Code W-613, P.O. Box 149030, Austin, Texas 78714-9030, must receive the written request for a formal appeal from the interested party within 15 calendar days after receiving the [~~DHS review panel's~~] written decision as specified in subsection (c) of this section. The written request for a formal appeal must state the basis of the appeal of the adverse action and include a legible copy of the written decision from the informal review referenced in subsection (c)(2)(B) of this section. The formal appeal is limited to the issues that were considered in the informal review process. The information from the interested party is limited to the pertinent information considered in the informal review process. Formal [~~DHS conducts formal~~] appeals are conducted in accordance with the provisions of 40 TAC §§79.1601 - 79.1610 [~~79.1614 (Formal Appeals)~~]. If there is a conflict between the applicable section of 40 TAC Chapter 79 (relating to Legal Services) and the provisions of this chapter, the provisions of this chapter prevail.

(e) Because the formal appeal is limited to issues considered in the informal review process, an informal review request that does not comply with subsections (c)(1)(A), (c)(1)(C), and (c)(2)(A) of this section is not subject to further appeal under 40 TAC §§79.1601 - 79.1610.

This 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 July 25, 2002.

TRD-200204584

Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 438-3734

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 100. CHARTERS

SUBCHAPTER A. OPEN-ENROLLMENT CHARTER SCHOOLS

19 TAC §100.101, §100.105

The State Board of Education (SBOE) proposes an amendment to §100.101 and new §100.105, concerning open-enrollment charter schools. Section 100.101 incorporates requirements in Texas Education Code (TEC), §12.111, that each charter specify the powers or duties of the governing body and TEC, §12.119, that the SBOE prescribe the period and manner of submission of an annual charter governance report, including articles of incorporation and bylaws. The proposed amendment to §100.101 would change a requirement relating to the submission of articles of incorporation or bylaws. The proposed new §100.105 would clarify applicability of existing rule and statute to public senior college or university charter schools.

Senate Bill (SB) 1, 74th Texas Legislature, 1995, granted the SBOE the authority to establish up to 20 open-enrollment charter schools to eligible entities. In 1997, the 75th Texas Legislature granted the SBOE the authority to approve 100 additional open-enrollment charters and an unlimited number of open-enrollment charters to serve students at risk of dropping out of school. House Bill (HB) 6, 77th Texas Legislature, 2001, called for the combination of these two types of charters into one open-enrollment category and limited the number of charters to 215. In addition, HB 6 granted the SBOE the authority to approve an unlimited number of charters to public senior colleges or universities.

The proposed amendment to 19 TAC §100.101, Annual Report on Open-Enrollment Charter Governance, would require charter schools to submit the articles of incorporation or bylaws of the sponsoring entity only if either document has been altered during the year. The current rule requires that both documents be filed with the agency annually.

The proposed new 19 TAC §100.105, Application to College or University Charters, is submitted in response to TEC, Chapter 12, Charters, Subchapter E, College or University Charter School, as added by HB 6, 77th Texas Legislature, 2001. The bill allows the SBOE to grant open-enrollment charters to public senior colleges or universities under different conditions than other open-enrollment charters. The proposed new 19 TAC §100.105 would clarify the applicability of existing rule and statute to this new category of open-enrollment charter schools.

Susan Barnes, Assistant Commissioner for Charter Schools, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Barnes 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 is that the open-enrollment charter school system will be strengthened by decreasing administrative duties when feasible and by including public senior colleges and universities as active sponsors of charter 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 proposed sections.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed sections submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The amendment and new section are proposed under the Texas Education Code (TEC), §12.119 and §12.154, as amended and added by HB 6, 77th Texas Legislature, 2001, which: (1) specifies that a charter holder shall file with the SBOE a copy of its articles of incorporation and bylaws within the period and in the manner prescribed by the SBOE; and (2) authorizes the SBOE to grant open-enrollment charters to public senior colleges or universities in accordance with criteria determined by the SBOE.

The amendment and new section implement the Texas Education Code, §12.119 and §12.154, as amended and added by HB 6, 77th Texas Legislature, 2001.

§100.101. Annual Report on Open-Enrollment Charter Governance.

(a) No later than November 1 of each year, each open-enrollment charter holder shall file under §100.1013 of this title (relating to Filing of Documents), the following information on a charter school governance reporting form approved by the State Board of Education:

(1) identifying information for and compensation of each officer and member of the governing body of the open-enrollment charter holder;

(2) identifying information for and compensation of each officer of the charter school; and

(3) identifying information for and compensation of each member of the governing body of the charter school, if the charter holder has established a governing body for the charter school.

(b) The identifying information required for an individual under subsection (a) of this section may include facsimile numbers and electronic mail addresses and shall include:

(1) the title of each position held or function performed by the individual;

(2) the specific powers and duties that the governing body of the charter holder or charter school have delegated to the individual, as described by the powers and duties listed in the charter;

(3) the legal name of the individual;

(4) any aliases or names formerly used by the individual, including maiden name;

(5) a mailing address for the individual, if an officer; and the street address of the individual's primary residence, if a governing body member; and

(6) telephone numbers for the individual.

(c) The compensation information required for an individual under subsection (a) of this section shall include all compensation, remuneration, and benefits received by the individual in any capacity from the charter holder or the charter school, or from any contractor or management company doing business with the charter holder or charter school. The compensation reported shall include without limitation:

(1) all salary, bonuses, benefits, or other compensation received pursuant to an employment relationship;

(2) all compensation received for goods or services under contract, agreement, informal arrangement, or otherwise;

(3) all payment of or reimbursement for personal expenses;

(4) all credit extended to the individual by the charter holder or charter school;

(5) the fair market value of all personal use of property paid for by the charter holder or charter school;

(6) the fair market value of all in-kind transfers of property;

(7) all compensation for goods or services provided to the charter holder through transactions unrelated to the charter school; and

(8) all other forms of compensation or remuneration received by the individual from the charter holder or charter school.

(d) No later than November 1 of each year, each open-enrollment charter holder shall file under §100.1013 of this title (relating to Filing of Documents): [~~a copy of its articles of incorporation and bylaws, or comparable documents if the charter holder does not have articles of incorporation or bylaws.~~]

(1) a copy of its articles of incorporation and bylaws, or comparable documents if the charter holder does not have articles of incorporation or bylaws; or

(2) if a copy of its articles of incorporation and bylaws or comparable documents is already on file under this subsection, a copy of any amendments or changes thereto.

§100.105. Application to College or University Charters.

Except as expressly provided in the rules in this subchapter, or where required by Texas Education Code (TEC), Chapter 12, Subchapter E (College or University Charter School), a provision of the rules in this subchapter applies to a college or university charter school as though the college or university charter school were granted a charter under TEC, Chapter 12, Subchapter D (Open-Enrollment Charter School).

This 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 July 26, 2002.

TRD-200204623
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-9701

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CHAPTER 109. BUDGETING, ACCOUNTING, AND AUDITING

The State Board of Education (SBOE) proposes amendments to §§109.1, 109.23, 109.25, 109.51, and 109.52, concerning budgeting, accounting, and auditing. Section 109.1 provides for a uniform system of accounting in public schools. Under current rules, school districts must utilize a uniform accounting system and maintain certain information for reporting to the agency. Section 109.23 and §109.25 provide for the completion and review of independent audits and reporting and auditing for state compensatory education funds. School districts are held accountable for the use of compensatory education allotments through desk reviews and detailed investigations as needed to assure compliance with the limitations in statute and rule. Section 109.51 establishes the requirement that each school district submit a blank uniform bid form to each bank located in the district and, if desired, to other banks interested in acting as depository for all funds. The section includes the bid form prescribed by the SBOE. Section 109.52 establishes the requirement that each school district select a bank as school depository and enter into a depository contract with the bank. A school district may select and contract with more than one bank. The section includes the depository contract form with the content prescribed by the SBOE.

The proposed amendment to §109.1 clarifies that charter schools are included in the public school requirements relating to budgeting, accounting, financial reporting, and auditing.

The proposed amendment to §109.23 adds the agreed-upon procedures report for the state compensatory education program.

The proposed amendment to §109.25 uses the phrase "public school" rather than "district" and clarifies applicability to charter schools. This amendment also changes wording to provide clarification that costs charged to state compensatory education shall be for programs and services that supplement the regular education program.

No changes are proposed to the rule text in §109.51; however, proposed revisions are reflected in the uniform bank bid form entitled "Bid Form for Acting as Depository for All Funds," which is referenced as Figure 19 TAC §109.51(b).

The proposed amendment to the rule text in §109.52 would add reference to depository contract filing requirements for charter schools, in accordance with 19 TAC §100.1043, Status and Use of State Funds; Depository Contract. The depository contract form entitled "Depository Contract for Funds of Independent School Districts Under Texas Education Code, Chapter 45, Subchapter G, School District Depositories," is referenced as Figure 19 TAC §109.52(b).

The proposed revisions to modify the bid form in §109.51 and the contract form in §109.52 include wording to eliminate the necessity of districts submitting copies of safekeeping receipts to the agency and to specify that the depository and district records are subject to audit at any time. The revisions also reorder the provision relating to the venue for litigation arising from a contractual dispute. Another revision removes the beginning and ending dates of September 1 and August 31 to allow for changes in fiscal year and would allow a district and its depository to mutually agree to extend a depository contract for one additional two-year term. This revision includes new language regarding extension of the contract and bid. In addition, a revision to the contract form includes clarification of the provision relating to the collateral pledge agreement.

School districts are required to use a uniform bank bid form to obtain bids from depository banks located in the district at least 30 days before the termination of the current depository contract. However, school districts may add to the uniform bank bid form to specify additional depository requirements. Depository contracts have traditionally been executed for a two-year period, expiring on August 31 in odd-numbered years. Depository bank contracts are legal instruments that help ensure the security of all school district funds on deposit. Additionally, depository contracts contain contractual terms and conditions describing depository bank services and fees. The updates to the bid form and the contract form have been reviewed and approved by the Texas Attorney General's Office. Recommendations made by the Texas Attorney General's Office have been incorporated into the forms.

Tom Canby, Managing Director of the Division of School Financial Audits, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Canby has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be: the use of a uniform accounting system that allows for consistent reporting of financial data and conditions across all school districts; the improvement of financial accountability for education programs in the Texas school system and keeping financial management practices current with changes in state law and federal rules and regulations; and the protection of public funds deposited in the event of any bank closures. Additionally, the bidding process and the proposed standard forms help ensure fair and open competition for depository bank contracts. Standard forms also provide an advantage to districts in evaluating the best bid in regard to depository bank services and related fees. There will not be an effect on small businesses. There is no anticipated economic cost to persons required to comply with the sections as proposed.

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed amendment submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

SUBCHAPTER A. BUDGETING, ACCOUNTING, FINANCIAL REPORTING, AND AUDITING FOR SCHOOL DISTRICTS

19 TAC §109.1

The amendment is proposed under the Texas Education Code, §§7.102(c)(33), 44.001, 44.002, 44.007, and 44.008, which authorizes the SBOE to adopt rules as necessary for the administration of provisions related to school district funds.

The amendment implements the Texas Education Code, §§7.102(c)(33), 44.001, 44.002, 44.007, and 44.008.

§109.1. Financial Accounting.

(a) (No change.)

(b) The commissioner of education shall develop and administer the requirements relating to budgeting, accounting, financial reporting, and auditing for Texas public schools. The commissioner of education shall ensure adequate stakeholder involvement in the design and modification of these requirements. The State Board of Education shall approve the budgeting, accounting, and reporting systems and the auditing procedures as determined by the commissioner of education. The school districts and charter schools shall install the budgeting, accounting, and financial reporting system as required by law and meet the audit requirements as developed by the commissioner of education and subject to review and comment by the state auditor when required by 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.

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204624
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
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For further information, please call: (512) 463-9701

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SUBCHAPTER B. TEXAS EDUCATION AGENCY AUDIT FUNCTIONS

19 TAC §109.23, §109.25

The amendments are proposed under the Texas Education Code, §§7.102(c)(33), 44.001, 44.008, 44.010, and 42.152, which authorizes the SBOE to adopt rules as necessary for the administration of provisions related to school district funds and to develop and implement a reporting and auditing system for district and campus expenditures of compensatory education funds.

The amendments implement the Texas Education Code, §§7.102(c)(33), 44.001, 44.008, 44.010, and 42.152.

§109.23. School District Independent Audits and Agreed-Upon Procedures.

(a) The performance and review of required school district, charter school, county education district, and regional education service center independent audits and agreed-upon procedures report, as applicable, including review of auditors' working papers, shall be accomplished in accordance with the Financial Accountability System Resource Guide, [~~Bulletin 679,~~] as adopted by reference in §109.41 of this title (relating to Financial Accountability System Resource Guide).

(b) The annual financial audit report and state compensatory agreed-upon procedures report are due 150 days after the end of the fiscal year.

(c) [~~(b)~~] Auditors from the Texas Education Agency shall review independent audit reports. Audit findings shall be resolved by the commissioner's designee.

§109.25. State Compensatory Education Program Reporting and Auditing System.

(a) Each school district and charter school shall report financial information relating to expenditure of the state compensatory education allotment under the Foundation School Program to the Texas

Education Agency (TEA). Each public school [district] shall report the information according to standards for financial accounting provided in §109.41 of this title (relating to Financial Accountability System Resource Guide.) The financial data will be reported annually through the Public Education Information Management System. The commissioner of education shall ensure that districts follow guidelines contained in the "Financial Accountability System Resource Guide" in attributing supplemental direct costs to state compensatory education and accelerated instruction programs and services. Costs charged to state compensatory education shall be for programs and services that supplement [enhance and improve] the regular education program.

(b) Each public school [district] shall ensure that supplemental direct costs and personnel attributed to compensatory education and accelerated instruction are identified in district and/or campus improvement plans at the summary level for financial units or campuses. Each public school [district] shall maintain documentation that supports the attribution of supplemental costs and personnel to compensatory education. Public schools [Districts] must also maintain sufficient documentation supporting the appropriate identification of students in at-risk situations, under criteria established in Texas Education Code (TEC), §29.081.

(c) The TEA shall conduct risk assessment and desk audit processes to identify the public schools [districts] or campuses most at risk of inappropriate allocation and/or underexpenditure of the compensatory education allotment. In the risk assessment and desk audit processes, the TEA shall consider the following factors:

(1) aggregate performance of students in at-risk situations on the state assessment instruments that is below the standards for the "acceptable" rating, as defined in the state accountability system;

(2) the financial management of compensatory education funds; and/or

(3) the quality of data related to compensatory education submitted by a public school [district].

(d) The TEA shall use the results of risk assessment and desk audit processes to prioritize public schools [districts] for the purpose of on-site visits and may conduct on-site visits.

(e) The TEA shall issue a preliminary report resulting from a desk audit or an on-site visit before submitting a final report to the public school [district]. After issuance of a preliminary report, a public school [district] must file with the TEA the following:

(1) a response to the preliminary report within 20 calendar days from the date of the preliminary report outlining steps the public school [district] will take to resolve the issues identified in the preliminary report; and

(2) a corrective action plan within 60 calendar days from the date of the preliminary report if the public school's [district's] response to the preliminary report does not resolve issues identified in the preliminary report.

(f) The TEA shall issue a final report that indicates whether the public school [district] has resolved the findings in the preliminary report and whether the corrective action plan filed under subsection (e)(2) of this section is adequate.

(1) If the final report contains a finding of noncompliance with TEC, §42.152(c), the report shall include a financial penalty authorized under TEC, §42.152(q).

(2) If the public school [district] responds with an appropriate corrective action plan, the TEA shall rescind the financial penalty and release the amount of the penalty to the public school [district].

(g) The TEA may conduct an on-site visit to verify the implementation of a public school's [district's] corrective action plan.

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

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Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-9701

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SUBCHAPTER D. UNIFORM BANK BID AND DEPOSITORY CONTRACT

19 TAC §109.51, §109.52

The amendments are proposed under the Texas Education Code (TEC), §7.102(c)(34), which requires the SBOE to prescribe uniform bid blanks for school districts to use in selecting a depository bank as required under TEC, §45.206; and §45.208, which requires the SBOE to prescribe the form and content of a depository contract or contracts, bond or bonds, or other necessary instruments setting forth the duties and agreements pertaining to a depository.

The amendments implement the Texas Education Code, §§7.102(c)(34), 45.206, and 45.208.

§109.51. Uniform Depository Bank Bid Form.

(a) (No change.)

(b) The uniform bid blank form is provided in this subsection entitled "Bid Form for Acting as Depository for All Funds."
Figure: 19 TAC §109.51(b)

§109.52. Uniform Depository Bank Contract and Surety Bond Forms.

(a) (No change.)

(b) The depository contract form is provided in this subsection entitled "Depository Contract for Funds of Independent School Districts Under Texas Education Code, Chapter 45, Subchapter G, School District Depositories."
Figure: 19 TAC §109.52(b)

(c) - (d) (No change.)

(e) For depository contract filing requirements for charter schools, refer to §100.1043 of this title (relating to Status and Use of State Funds; Depository Contract).

This 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 July 26, 2002.

TRD-200204626
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
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For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §§213.27 - 213.29

The Board of Nurse Examiners for the State of Texas proposes amendments to 22 TAC §§213.27 - 213.29. These rules concern the Practice and Procedure of the Board of Nurse Examiners. These proposed amendments are being done pursuant to the Board's rule review published in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2845).

The Board of Nurse Examiners reviewed the rules governing practice and procedure and determined that some of the sections of the existing rule warranted clarification, simplification, updating, and changes to address certain provisions which were found to be inadequate in application. The review of these sections required implementation of wording that more accurately reflected current statutory provisions and Board policies. The Board updated and amended the sections to mirror or incorporate Texas Occupations Code chapter 53, Consequences of Criminal Convictions, and the Board's enabling statutes. As a result, the Board of Nurse Examiners has determined that the proposed amendments of the current sections are warranted.

The proposed amendments to §§213.27 - 213.29 are made subject to §2001.039 of the Texas Government Code requiring rule review within four years of the date of a rule's last review or adoption. These proposed amendments complete the requisite review of Chapter 213.

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

Ms. Thomas has also determined that for each year of the first five years the amended sections are in effect, the public benefit will be that registered nurses will have a better understanding of the necessary procedural requirements because of the amended sections. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Written comments on the proposed amendments may be submitted to Katherine A. Thomas, MN, RN, Executive Director, Board of Nurse Examiners, P.O. Box 430, Austin, Texas 78767-0430.

The amendments are proposed pursuant to Texas Occupations Code §301.151 which authorizes the Board to propose rules necessary for the performance of its duties.

No other statutes, articles, or codes will be affected by these amended sections.

§213.27. Good Professional Character.

(a) (No change.)

(b) Factors to be used in evaluating good professional character in eligibility and disciplinary matters are:

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

(3) Any conviction for a felony or for a misdemeanor involving moral turpitude or order of probation with or without an adjudication of guilt for an offense that would be a felony or misdemeanor involving moral turpitude if guilt were adjudicated.

(4) Any revocation, suspension, or denial of, or any other adverse action relating to, the person's license or privilege to practice nursing in another jurisdiction.

(c) The following provisions shall govern the determination of present good professional character and fitness of a Petitioner, Applicant, or Licensee who has been convicted of a felony in Texas or placed on probation for a felony with or without an adjudication of guilt in Texas, or who has been convicted or placed on probation with or without an adjudication of guilt in another jurisdiction for a crime which would be a felony in Texas. A Petitioner, Applicant, or Licensee may be found lacking in present good professional character and fitness under this rule based on the underlying facts of a felony conviction or deferred adjudication, as well as based on the conviction or probation through deferred adjudication itself.

(1) The record of conviction or order of deferred adjudication is conclusive evidence of guilt.

(2) An individual guilty of a felony under this rule is conclusively deemed not to have present good professional character and fitness and should not file a Petition for Declaratory Order or Application for Endorsement for a period of three years after the completion of the sentence and/or period of probation.

(3) In addition to the disciplinary remedies available to the Board pursuant to Texas Occupations Code Annotated §301.452(b)(3) and (4), Texas Occupations Code chapter 53, and §213.28 of this title (relating to Licensure of Persons with Criminal Convictions), a licensee guilty of a felony under this rule is conclusively deemed to have violated Texas Occupations Code Annotated §301.452(b)(10) and is subject to appropriate discipline, up to and including revocation.

(d) The following provisions shall govern the determination of present good professional character and fitness of a Petitioner, Applicant, or Licensee who has been licensed to practice professional nursing in any jurisdiction and has been disciplined, or allowed to voluntarily surrender in lieu of discipline, in that jurisdiction.

(1) A certified copy of the order, judgment of discipline, or order of adverse licensure action from the jurisdiction is prima facie evidence of the matters contained in such order, judgment, or adverse action and is conclusive evidence that the individual in question has committed professional misconduct as alleged in such order of judgment.

(2) An individual disciplined for professional misconduct in the course of practicing professional nursing in any jurisdiction or an or an individual who resigned in lieu of disciplinary action (disciplined individual) is deemed not to have present good professional character and fitness and is, therefore, ineligible to file an Application for Endorsement to the Texas Board of Nursing during the period of such discipline imposed by such jurisdiction, and in the case of revocation or surrender in lieu of disciplinary action, until the disciplined individual has filed an application for reinstatement in the disciplining jurisdiction and obtained a final determination on that application.

(3) The only defenses available to a Petitioner, Applicant, or Licensee under section (d) are outlined below and must be proved by clear and convincing evidence:

(A) The procedure followed in the disciplining jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process.

(B) There was such an infirmity of proof establishing the misconduct in the other jurisdiction as to give rise to the clear conviction that the Board, consistent with its duty, should not accept as final the conclusion on the evidence reached in the disciplining jurisdiction.

(C) The deeming of lack of present good professional character and fitness by the Board during the period required under the provisions of this subsection would result in grave injustice.

(D) The misconduct for which the individual was disciplined does not constitute professional misconduct in Texas.

(4) If the Board determines that one or more of the foregoing defenses has been established, it shall render such orders as it deems necessary and appropriate.

(e) An individual who applies for initial licensure, reinstatement, renewal, or endorsement to practice professional nursing in Texas after the expiration of the three- year period in subsection (c)(2) of this section and subsection (f) of this section, or after the completion of the disciplinary period assessed or ineligibility period imposed by any jurisdiction under subsection (d) of this section shall be required to prove, by a preponderance of the evidence:

(1) that the best interest of the public and the profession, as well as the ends of justice, would be served by his or her admission to practice professional nursing; and

(2) that (s)he is of present good professional character and fitness.

(f) An individual who applies for initial licensure, reinstatement, renewal, or endorsement to practice professional nursing in Texas after a negative determination based on a felony conviction, felony probation with or without an adjudication of guilt, or professional misconduct, or voluntary surrender in lieu of disciplinary action and whose application or petition is denied and not appealed is not eligible to file another petition or application for licensure until after the expiration of three years from the date of the Board's order denying the preceding petition for licensure.

§213.28. Licensure of Persons with Criminal Convictions.

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

(c) In considering whether a criminal conviction renders the individual ineligible for licensure or renewal of licensure as a registered nurse, the Board shall consider:

(1) - (6) (No change.)

(7) whether imprisonment followed a felony conviction, felony community supervision revocation, revocation of parole or revocation of mandatory supervision; and

(8) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude.

(d) In addition to the factors that may be considered under subsection (c) of this section, the Board, in determining the present fitness of a person who has been convicted of a crime, shall consider:

(1) (No change.)

(2) the age of the person when the crime was committed [~~at the time of the commission of the crime~~];

(3) (No change.)

(4) the conduct and work activity of the person before [~~prior to~~] and after [~~following~~] the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after [~~following~~] release; and

(6) other evidence of the person's present fitness, including letters of recommendation from: prosecutors and [~~prosecutional~~] law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; the sheriff or chief of police in the community where the person resides; and any other persons in contact with the convicted person.

(e) It shall be the responsibility of the applicant, to the extent possible, to obtain [~~secure~~] and provide to the Board the recommendations of the prosecution, law enforcement, and correctional authorities as required under this Act. The applicant shall also furnish proof in such form as may be required by the Board [~~licensing authority~~] 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.

(f) - (h) (No change.)

§213.29. Criteria and Procedure Regarding Intemperate Use and Lack of Fitness in Eligibility and Disciplinary Matters.

(a) A person desiring to obtain or retain a license to practice professional nursing shall provide evidence of current sobriety and fitness consistent with this rule.

(b) (No change.)

(c) If a registered nurse is reported to the Board for intemperate use, abuse of drugs or alcohol, or diagnosis of or treatment for chemical dependency; or if a person is unable to sign the certification in subsection (b) of this section, the following restrictions and requirements apply:

(1) Any matter before the Board that involves an allegation of chemical dependency, or misuse or abuse of drugs or alcohol, will require at a minimum that such person obtain for Board review a chemical dependency evaluation performed by a licensed chemical dependency evaluator or other professional approved by the executive director;

(2) Those persons who have become addicted to or treated for alcohol or chemical dependency will not be eligible to obtain or retain a license to practice as a registered nurse unless such person can demonstrate sobriety and abstinence for the preceding twelve consecutive months through verifiable and reliable evidence, or can establish eligibility to participate in a peer assistance program created pursuant to Chapter 467 of the Health and Safety Code;

(3) Those persons who have become addicted to or treated for alcohol or chemical dependency will not be eligible to obtain or retain an unencumbered license to practice professional nursing until the individual has attained a five-year term of sobriety and abstinence or until such person has successfully completed participation in a peer assistance program created pursuant to Chapter 467 of the Health and Safety Code.

(4) Those persons who have been diagnosed with, treated, or hospitalized for the disorders mentioned in subsection (b) of this section shall execute an authorization for release of medical, psychiatric, and treatment records.

[~~(c) Such person, if unable to sign the certification in subsection (b) of this section, shall execute an authorization for release of medical, psychiatric and treatment records in relation to the conditions mentioned in subsection (b) of this section.~~]

(d) It shall be the responsibility of those persons subject to this rule [~~Such person shall~~] to submit to and pay for an evaluation by a professional approved by the executive director to determine current sobriety and fitness. The evaluation shall be limited to the conditions mentioned in subsection (b) of this section.

(e) (No change.)

[~~(f) No license shall be denied under this rule unless it is shown that the person seeking to obtain or retain the license poses a direct threat to the health and safety of patients/clients, their families or significant others or the public.~~]

(f) [~~(g)~~] With respect to chemical dependency in eligibility and disciplinary matters, the executive director is authorized to:

(1) review submissions from a movant, materials and information gathered or prepared by staff, and identify any deficiencies in file information necessary to determine the movant's request;

(2) close any eligibility file in which the movant has failed to respond to a request for information or to a proposal for denial of eligibility within 60 days thereof;

(3) approve eligibility, enter eligibility orders and approve renewals, without Board ratification, when the evidence is clearly insufficient to prove a ground for denial of licensure; and

(4) propose conditional orders in eligibility, disciplinary and renewal matters for individuals who have experienced chemical/alcohol dependency within the past five years provided:

(A) the individual presents reliable and verifiable evidence of having functioned in a sober/abstinent manner for the previous twelve consecutive months; and

(B) licensure limitations/stipulations and/or peer assistance program participation can be implemented which will ensure that patients and the public are protected until the individual has attained a five-year term of sobriety/abstinence.

(g) [~~(h)~~] With respect to mental illness in eligibility, disciplinary, and renewal matters, the executive director is authorized to propose conditional orders for individuals who have experienced mental illness within the past five years provided:

(1) the individual presents reliable and verifiable evidence of having functioned in a manner consistent with the behaviors required of nurses under the Nursing Practice Act and Board rules for at least the previous twelve consecutive months; and

(2) licensure limitations/stipulations and/or peer assistance program participation can be implemented which will ensure that patients and the public are protected until the individual has attained a five-year term of controlled behavior and consistent compliance with the requirements of the Nursing Practice Act and Board rules.

(h) [~~(i)~~] In renewal matters involving chemical dependency or mental illness, the executive director shall consider the following information from the preceding renewal period:

(1) evidence of the licensee's safe practice;

(2) compliance with the NPA and Board rules; and

(3) written verification of compliance with any treatment.

(i) [~~(j)~~] Upon receipt of items (h) [~~(i)~~](1) - (3) of this section, the executive director may renew the license.

This 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 July 26, 2002.

TRD-200204666
Katherine Thomas
Executive Director
Board of Nurse Examiners
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-6823

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER E. RESPONSIBILITIES TO THE BOARD/PROFESSION

22 TAC §501.90

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.90 concerning Discreditable Acts.

The amendment to §501.90 will include as a discreditable act a criminal punishment of community service.

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 amendment does not require anyone to do anything that is not already being done.

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 amendment does not require anyone to do anything that is not already being done.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment does not require anyone to do anything that is not already being done.

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 the board will be able to consider and take appropriate action against licensees who are sentenced to community service.

The probable economic cost to persons required to comply with the amendment will be zero because the amendment does not require anyone to do anything that is not already being done.

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 Friday, August 30, 2002. 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 amendment does not require anyone to do anything that is not already being done.

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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.502 which authorizes the board to take disciplinary action for certain reasons.

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

§501.90. Discreditable Acts.

A certificate or registration holder shall not commit any act that reflects adversely on his fitness to engage in the practice of public accountancy. A discreditable act includes but is not limited to:

(1) fraud or deceit in obtaining a certificate as a certified public accountant or in obtaining registration under the Act or in obtaining a license to practice public accounting;

(2) dishonesty, fraud or gross negligence in the practice of public accountancy;

(3) violation of any of the provisions of Subchapter J or §901.458 of the Act applicable to a person certified or registered by the board;

(4) final conviction of a felony or imposition of deferred adjudication or community supervision in connection with a criminal prosecution of a felony under the laws of any state or the United States;

(5) final conviction of any crime or imposition of deferred adjudication or community supervision in connection with a criminal prosecution, an element of which is dishonesty or fraud under the laws of any state or the United States;

(6) cancellation, revocation, suspension or refusal to renew authority to practice as a certified public accountant or a public accountant by any other state for any cause other than failure to pay the appropriate registration fee in such other state;

(7) suspension or revocation of or a voluntary consent decree concerning the right to practice before any state or federal agency for a cause which in the opinion of the board warrants its action;

(8) knowingly participating in the preparation of a false or misleading financial statement or tax return;

(9) fiscal dishonesty or breach of fiduciary responsibility of any type;

(10) failure to comply with a final order of any state or federal court;

(11) repeated failure to respond to a client's inquiry within a reasonable time without good cause;

(12) misrepresenting facts or making a misleading or deceitful statement to a client;

(13) false swearing or perjury in any communication to the board or any other federal or state regulatory or licensing authority;

(14) threats of bodily harm or retribution to a client;

(15) public allegations of a lack of mental capacity of a client which cannot be supported in fact;

(16) causing a breach in the security of the CPA examination;

(17) voluntarily disclosing information communicated to the certificate holder by an employer, past or present, or through the certificate holder's employment in connection with accounting services rendered to the employer, except:

(A) by permission of the employer;

(B) pursuant to the Government Code, Chapter 554 (commonly referred to as the "Whistle Blowers Act");

(C) pursuant to a subpoena or other compulsory process in a court proceeding;

(D) in an investigation or proceeding by the board under the Public Accountancy Act; or

(E) in an ethical investigation conducted by a professional organization of certified public accountants; and

(18) breaching the terms of an agreed consent order entered by the Board or violating any Board Order.

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204635
Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-7848

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22 TAC §501.93

The Texas State Board of Public Accountancy (Board) proposes an amendment to §501.93 concerning Responses.

The amendment to §501.93 will within 30 days of receipt of a request for documents, require Respondents in investigations to provide complete copies of requested documents at their expense or provide originals for the board to photocopy at the board's expense.

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 less than $100.00 per year because the board is already using this procedure.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the amendment will be less than $100.00 per year because the board is already using this procedure.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because this is not a revenue generating rule.

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 Respondents will know that they have to either photocopy documents at their expense or provide originals to the board to photocopy at its expense.

The probable economic cost to persons required to comply with the amendment will be less than $100.00 per year because the board is already using this procedure.

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 Friday, August 30, 2002. 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 respondents may elect to mail their records to the board to be photocopied thereby incurring only postage expenses.

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, §901.151 (Vernon 2001) 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.

§501.93. Responses.

(a) An applicant, certificate or registration holder shall substantively respond in writing to any communication from the board requesting a response, within 30 days of the mailing of such communication by registered or certified mail to the last address furnished to the board by the applicant, certificate or registration holder.

(b) An applicant, certificate or registration holder shall provide copies of documentation and/or working papers in response to the board's request at no expense to the board within 30 days of the mailing of such a request by registered or certified mail to the last address furnished to the board by the applicant, certificate or registration holder. An applicant, certificate or registration holder may comply with this subsection by providing the board with original records for the board to duplicate. In such a circumstance, upon request the board will provide an affidavit from the custodian of records documenting custody and control of the records.

(c) [~~(b)~~] Failure to respond substantively to written board communications, or failure to furnish requested documentation and/or working papers, constitutes conduct indicating lack of fitness to serve the public as a professional accountant.

(d) [~~(c)~~] Each applicant, certificate holder and each person required to be registered with the board under the Act shall notify the board, in writing, of any and all changes in such person's mailing address and the effective date thereof within 30 days before or after such effective date.

(e) [~~(d)~~] An applicant, certificate or registration holder who is a party to a contested case in a disciplinary action brought by the board may be deposed at the board's offices in Austin, Texas. Any such party may seek a protective order concerning the place of deposition on grounds stated in Texas Rule of Civil Procedure 192.6.

This 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-200204636
Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-7848

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CHAPTER 521. FEE SCHEDULE

22 TAC §521.2

The Texas State Board of Public Accountancy (Board) proposes an amendment to §521.2 concerning Examination Fees.

The amendment to §521.2 will allow the board to pass on to examination applicants the $5.00 increase in the examination grading fee that is imposed by the examination preparer and grader, the American Institute of Certified Public Accountants.

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 amendment does not require the state to do anything that it is not already doing.

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 amendment does not require the state and local governments to do anything that it is not already doing.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment does not require the state to do anything that it is not already doing.

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 the examination grading fee increase will be passed on to those persons who cause or incur the fee.

The probable economic cost to persons required to comply with the amendment will be five dollars per examination part, up to a maximum of $20.00, each time they take an examination.

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 Friday, August 30, 2002. 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 $5.00 per examination part, up to a maximum of $20.00 is too small to be an adverse economic effect.

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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.304 which authorizes the board to establish an examination fee by board rule.

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

§521.2. Examination Fees.

(a) The following fees shall be effective for the Uniform CPA Examination.

(b) The fee for the initial examination conducted pursuant to the Act shall be $234.00.[~~$214.00.~~] The fee for any examination shall be apportioned as follows:

(1) eligible for one subject--$73.50;[~~$68.50;~~]

(2) eligible for two subjects--$117.00; and[~~$107.00; and~~]

(3) eligible for four subjects--$234.00.[~~$214.00.~~]

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204638

Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-7848

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22 TAC §521.10

The Texas State Board of Public Accountancy (Board) proposes an amendment to §521.10 concerning Out-of-State Proctoring Fee.

The amendment to §521.10 will allow the board to pass on to examination applicants the $5.00 increase in the examination grading fee that is imposed by the examination preparer and grader, the American Institute of Certified Public Accountants.

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 amendment does not require the state to do anything that it is not already doing.

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 amendment does not require the state and local governments to do anything that it is not already doing.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment does not require the state to do anything that it is not already doing.

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 the examination grading fee increase will be passed on to those persons who cause or incur the fee.

The probable economic cost to persons required to comply with the amendment will be five dollars per examination part, up to a maximum of $20.00, each time they take an examination.

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 Friday, August 30, 2002. 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 $5.00 per examination part, up to a maximum of $20.00 is too small to be an adverse economic effect.

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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.304 which authorizes the board to establish an examination fee by board rule.

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

§521.10. Out-of-State Proctoring Fee.

The fee for proctoring the examination for a candidate applying to another licensing jurisdiction shall be apportioned as follows:

(1) eligible for one subject--$73.50;[~~$68.50;~~]

(2) eligible for two subjects--$117.00; and[~~$107.00; and~~]

(3) eligible for four subjects--$234.00.[~~$214.00.~~]

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204639
Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: September 8, 2002
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 §523.34

The Texas State Board of Public Accountancy (Board) proposes new §523.34 concerning Course Content and Board Approval after September 1, 2003.

The new §523.34 will address the content of the Ethics Course starting September 1, 2003.

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 the board already monitors the content of Ethics courses.

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 the board already monitors the content of Ethics courses.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be zero because the board already monitors the content of Ethics courses.

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 the content of the Ethics course will be more relevant and geared toward the board's goals.

The probable economic cost to persons required to comply with the new rule will be zero because persons are already required to take an Ethics Course. The amendment changes the content of the course.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

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 Friday, August 30, 2002. 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 new rule will not have an adverse economic effect on small businesses because the board already monitors the content of Ethics courses.

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 amendment 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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to require continuing professional education.

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

§523.34. Course Content and Board Approval after September 1, 2003.

(a) Effective September 1, 2003 the content of an ethics course must be submitted to and approved by the continuing professional education (CPE) committee of the board for initial approval and every three years thereafter. Course content shall be approved only after the developer of the course demonstrates, 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 meets the following objectives:

(1) the course shall be designed to teach CPAs to achieve and maintain the highest standards of ethical conduct;

(2) the course shall be designed to teach the core values of the profession, integrity, objectivity and independence, as ethical principles in addition to rules of conduct;

(3) the course shall be designed to teach compliance with the spirit and intent of the Rules of Professional Conduct, rather than mere technical compliance with the Rules; and

(4) the course shall address ethical considerations and the application of the Rules of Professional Conduct to all aspects of the professional accounting work whether performed by CPAs in client practice or CPAs who are not in client practice.

(b) The ethics course must be taught only by instructors approved by and under contract to the board. The board will contract with any instructor wishing to offer this course who can demonstrate that:

(1) 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;

(2) the instructor's certificate or license has never been suspended or revoked for violation of the Rules of Professional Conduct; and

(3) the instructor is qualified to teach ethical reasoning because he or she has:

(A) experience in the study and teaching of ethical reasoning; and

(B) formal training in organizational or ethical behavior instruction.

(c) A sponsor of an approved ethics course shall comply with the board rules concerning sponsors of CPE and shall provide its advertising materials to the board's CPE committee for approval. Such advertisements shall:

(1) avoid commercial exploitation;

(2) identify the primary focus of the course; and

(3) be professionally presented and consistent with the intent of §501.82 of this title (relating to Advertising).

(d) Board Rules and Ethics courses will be reevaluated every three years or as required by the board.

(e) As part 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.

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Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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SUBCHAPTER D. MANDATORY CONTINUING PROFESSIONAL EDUCATION (CPE) PROGRAM

22 TAC §523.63

The Texas State Board of Public Accountancy (Board) proposes an amendment to §523.63 concerning Mandatory Continuing Professional Education Attendance.

The amendment to §523.63 will clarify that continuing professional education (CPE) courses may only be taught by board approved instructors.

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 amendment is a clarification and is not a substantive change.

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 amendment is a clarification and is not a substantive change.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment is a clarification and is not a substantive change.

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 the rule's clarification will assist CPAs and potential CPE course sponsors to determine the CPE is acceptable to the board.

The probable economic cost to persons required to comply with the amendment will be zero because the amendment is a clarification and is not a substantive change.

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 Friday, August 30, 2002. 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 amendment is a clarification and is not a substantive change.

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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to enact rules regarding CPE.

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

§523.63. Mandatory Continuing Professional Education Attendance.

A licensee shall complete at least 120 hours of continuing professional education (CPE) in each three-year period, and a minimum of 20 hours in each one-year period. Except as provided by board rule, this CPE shall be offered by board contracted CPE sponsors. The exception to this requirement is an initial licensee, one who has been certified or registered for less than 12 months.

(1) The exception to the 120 continuing professional education requirement is an initial licensee, one who is paying the license fee for the first time.

(A) To be issued a license that is less than twelve months from the date of certification or registration, the licensee does not have a continuing professional education hour requirement. The first twelve-month period begins on the date of certification and ends with the last day of the licensee's birth month.

(B) To be issued a license for the first full twelve-month license period, the licensee does not have a continuing professional education accrual requirement and can report zero hours.

(C) To be issued a license for the second full twelve-month period, the licensee must report a minimum of 20 continuing professional education hours. The hours must be accrued in the 12 months preceding the license period.

(D) To be issued a license for the third full twelve-month license period, the licensee must report a total of at least 60 continuing professional education hours that were accrued in the 24 months preceding the license period. At least 20 hours of the requirement must be accrued in the 12 months preceding the license period.

(E) To be issued a license for the fourth full twelve-month period, the licensee must report 100 continuing professional education hours that were accrued in the 36 months preceding the license period. At least 20 hours of the requirement must be accrued in the 12 months preceding the license period.

(F) To be issued a license for the fifth and subsequent license periods, the licensee must report a total of at least 120 continuing professional education hours that were accrued in the 36 months preceding the license period, and at least 20 hours of the requirement must be accrued in the 12 months preceding the license period.

(2) A former licensee whose certificate or registration has been revoked for failure to pay the license fee and who makes application for reinstatement, must pay the required fees and penalties and must accrue the minimum continuing professional education credit hours missed.

(3) The board may consider granting an exemption from the continuing professional education requirement on a case-by-case basis if:

(A) a licensee completes and forwards to the board a sworn affidavit indicating that the licensee will not be employed during the period for which the exemption is requested. A licensee who has been granted this exemption and who re-enters the work force shall be required to report continuing professional education hours missed as a result of the exemption subject to a maximum of 200 hours. Such continuing professional education hours shall be accrued from the technical area as described in §523.2 and §523.32 of this title (relating to Standards for Continuing Professional Education Program Development and Ethics Course);

(B) a licensee completes and forwards to the board a sworn affidavit indicating no association with accounting work. The affidavit shall include, as a minimum, a brief description of the duties performed, job title, and verification by the licensee's immediate supervisor;

(i) For purposes of this section, the term "association with accounting work" shall include the following:

(I) working or supervising work performed in the areas of financial accounting and reporting; tax compliance, planning or advice; management advisory services; data processing; treasury, finance, or audit; or

(II) representing to the public, including an employer, that the licensee is a CPA or public accountant in connection with the sale of any services or products, including such designation on a business card, letterhead, promotional brochure, advertisement, or office; or

(III) offering testimony in a court of law purporting to have expertise in accounting and reporting, auditing, tax, or management services; or

(IV) for purposes of making a determination as to whether the licensee fits one of the categories listed in this subclause and subclauses (I)-(III) of this clause, the questions shall be resolved in favor of inclusion of the work as "association with accounting work."

(ii) A licensee who has been granted this exemption and who loses the exemption shall accrue continuing professional education hours missed as a result of the exemption subject to a maximum of 200 hours. Such continuing professional education hours shall be earned in the technical area as described in §523.2 and §523.32 of this title (relating to Standards for Continuing Professional Education Program Development and Ethics Course).

(C) a licensee not residing in Texas, who submits a sworn statement to the board that the licensee does not serve Texas clients from out of state;

(D) a licensee shows reasons of health, certified by a medical doctor, that prevent compliance with the CPE requirement. A licensee must petition the board for the exemption and provide documentation that clearly establishes the period of disability and the resulting physical limitations;

(E) a licensee is on extended active military duty during the period for which the exemption is requested, and files a copy of orders to active military duty with the board; or

(F) a licensee shows reason which prevents compliance, that is acceptable to the board.

(4) A licensee who has been granted the retired or disabled status under Section 515.8 of this title (relating to Retirement Status or Permanent Disability) is not required to report any continuing professional education hours.

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

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Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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22 TAC §523.66

The Texas State Board of Public Accountancy (Board) proposes new §523.66 concerning Continuing Professional Education for non-CPA Owners.

The new §523.66 will extend the board's Continuing Professional Education (CPE) requirements to non-CPA owners of CPA firms.

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 less than $300.00 a year because the board is already processing CPE for all of its CPA licensees and the increment and increase in work is anticipated to be slight.

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 the rule is not designed or intended to reduce costs.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be less than $300.00 a year because the board is already processing CPE for all of its CPA licensees and the increment and increase in work is anticipated to be slight.

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 non-CPA owners of CPA firms will be completing CPE courses to improve or maintain their professional competency.

The probable economic cost to persons required to comply with the new rule will be about $200.00 per year using an estimate of $5.00 per hour for 40 hours of CPE each year. Some hours of CPE are available free of charge.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

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 Friday, August 30, 2002. 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 new rule will not have an adverse economic effect on small businesses because the estimated cost is $200.00 per year and is used to maintain or improve professional competency and to allow ownership in and active participation in a CPA firm. Under these circumstances the $200.00 amount is not considered to be an adverse amount.

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 amendment 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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to enact rules regarding CPE.

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

§523.66. Continuing Professional Education for non-CPA Owners.

(a) Each non-CPA owner of a licensed CPA firm shall complete an average of 120 hours of continuing professional education (CPE) in each three-year period and have a minimum of 20 hours per year. These hours shall be reported on the required board forms. The failure of any non-CPA owner of a licensed CPA firm to complete and report such CPE shall be grounds for revoking the firm's license on the grounds that the owner is not qualified.

(b) The board will accept any continuing professional education that is offered or accepted by organizations or regulatory bodies issuing any professional designation used by the non-CPA owner. All other CPE must be provided by board-accepted CPE sponsors or be otherwise approved by the board, provided however, that the board reserves the right to reject any claimed CPE.

(c) Every non-CPA owner of a licensed CPA firm shall complete a board-approved rules and ethics course in accordance with Section 523.32 of this title (relating to Board Rules and Ethics Course).

(d) The board has the right to audit any CPE hours claimed. A firm shall provide the board all information required for this audit in accordance with Section 501.93 of this title (relating to Responses) and the firm shall be responsible for its non-CPA owner's cooperation with the audit.

This 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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Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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SUBCHAPTER E. REGISTERED CONTINUING EDUCATION SPONSORS

22 TAC §523.71

The Texas State Board of Public Accountancy (Board) proposes an amendment to §523.71 concerning Board Contracted CPE Sponsors.

The amendment to §523.71 will state the criteria required to become a CPE Sponsor.

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 amendment is intended to collect fees and to defray costs.

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 amendment is intended to collect fees and to defray costs.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment is intended to collect fees and to defray costs.

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 clear written standards for one to become and to continue to be a board contracted CPE Sponsor.

The probable economic cost to persons required to comply with the amendment will be $100.00 per year.

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 Friday, August 30, 2002. 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 amount is small and grants a means to earn tuition fees.

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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to require continuing professional education.

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

§523.71 . Board Contracted CPE Sponsors [~~Application as a Sponsor~~].

(a) The board will contract with any sponsor of continuing professional education (CPE) programs to become a board contracted CPE sponsor where the sponsor demonstrates that its programs conform to the board's standards as outlined in:

(1) Section 523.21 of this title (relating to Program Description Standards);

(2) Section 523.22 of this title (relating to Instructors);

(3) Section 523.23 of this title (relating to Program Sponsors Other Responsibilities);

(4) Section 523.24 of this title (relating to Learning Environment);

(5) Section 523.25 of this title (relating to Evaluation);

(6) Section 523.26 of this title (relating to Program Time Credit Measurement);

(7) Section 523.29 of this title (relating to Minimum Hours Required Per CPE Reporting Period as a Participant) and

(8) Section 523.32 of this title (relating to Board Rules and Ethics Course), (if applicable).

(b) [~~(a)~~] Each organization desiring to become a board contracted CPE sponsor [~~register as a provider of continuing professional education~~] shall submit an application on forms provided by the board. This application must be complete in all respects.

(c) [~~(b)~~] The board's staff will review each application for registration and notify the applicant of its acceptance or rejection. An accepted sponsor[~~Accepted sponsors~~] will be assigned a sponsor number and can represent that it is a board contracted CPE sponsor when it has paid $100.00 per calendar year to the board under the board contract. A rejected applicant[~~Rejected applicants~~] will be notified of the reason for rejection.

(d) All contracts with board contracted CPE sponsors shall be renewable annually on November 30.

This 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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Amanda G. Birrell
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Texas State Board of Public Accountancy
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22 TAC §523.72

(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 §523.72 concerning Renewal Application.

The proposed repeal of §523.72 will remove an unnecessary rule from the board's rules because this rule will move to §523.71.

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 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 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 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 a duplicate rule will be eliminated 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 anything.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

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 Friday, August 30, 2002. 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 repeal will not have an adverse economic effect on small businesses because the repeal does not require anyone to do anything.

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, Tex. Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

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

§523.72. Renewal Application.

This 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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Amanda G. Birrell
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Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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22 TAC §523.73

The Texas State Board of Public Accountancy (Board) proposes an amendment to §523.73, concerning Obligations of the Sponsor.

The amendment to §523.73 will make some minor non-substantive changes and will require Sponsors to cooperate with board inquiries and promptly provide all requested documents.

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 amendment does not require the state to do anything different.

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 amendment does not require the state or local government to do anything different.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the amendment will be zero because the amendment does not require the state to do anything different.

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 CPE Sponsors will be required to cooperate with board inquiries and provide copies of documents.

The probable economic cost to persons required to comply with the amendment will be zero because CPE Sponsors are already required to cooperate and provide copies.

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 Friday, August 30, 2002. 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 CPE Sponsors are already required to cooperate and provide copies.

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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to enact rules regarding CPE.

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

§523.73. Obligations of the Sponsor.

(a) In consideration for the contract [~~registration~~] as a board contracted continuing professional education (CPE) sponsor [~~of continuing professional education,~~] every organization shall agree, in writing, to the following:

(1) "We understand that after acceptance of the application or reapplication for a contract by the board we may advise prospective attendees of the program sponsor agreement, our sponsor number, and the number of credit hours recommended. We further agree that if we notify licensees of this agreement we shall do so by use of the following language. "We have entered into an agreement with the Texas State Board of Public Accountancy to meet the requirements of continuing professional education rules covering maintenance of attendance records, retention of program outlines, qualifications of instructors, program content, physical facilities, and length of class hours. This agreement does not constitute an endorsement by the board as to the quality of the program or its contribution to the professional competence of the licensee."

(2) "We understand that our advertising shall not be false or misleading, nor contain words such as "accredited" or "approved" or any terms which may imply that a determination has been made by the board regarding the merits or quality of the program."

(3) "We agree that board members, board staff, or its official designees may inspect our facilities, examine our records, attend our courses or seminars at no charge, and audit our program to determine compliance with the sponsor agreement and the continuing professional education standards of the board."

(4) "We understand and agree that if we fail to comply with this agreement or fail to meet acceptable standards in our programs, our sponsor agreement may be terminated at any time by the board, our sponsor agreement renewal application denied, and notice of such termination or denial may be provided to licensees by the board."

(b) Every board contracted CPE sponsor shall cooperate fully with the board's sponsor review oversight program. This cooperation shall include, but not be limited to providing information, records and access to programs and instructors as requested. Failure to cooperate with the program shall be grounds for terminating the contract.

This 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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Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
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For further information, please call: (512) 305-7848

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22 TAC §523.75

The Texas State Board of Public Accountancy (Board) proposes new §523.75, concerning Sponsor Review Oversight Program.

The new rule will establish the Sponsor Review Oversight Program and the Sponsor Review Oversight Board.

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 the program will be self-supported by fees from Sponsors.

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 the program will be self-supported by fees from Sponsors.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rule will be zero because the program will be self-supported by fees from Sponsors.

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 a board will be monitoring sponsors, conducting inquiries and making appropriate recommendations.

The probable economic cost to persons required to comply with the new rule will be zero because this rule creates a new program and a new board, it does not require anything of individual CPAs.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rule will not affect a local economy.

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 Friday, August 30, 2002. 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 new rule will not have an adverse economic effect on small businesses because the costs incurred by compliance with this rule are the board's costs, which are offset by revenue from another rule.

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 amendment 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, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.411 which authorizes the board to enact rules regarding CPE.

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

§523.75. Sponsor Review Oversight Program.

(a) A sponsor review oversight program is hereby established for the purpose of monitoring the compliance by board contracted continuing professional education (CPE) sponsors and the courses they offer with board contracts, standards and board rules. The program shall emphasize high quality education and compliance with professional standards. In the event a sponsor does not comply with board rules, or instruction or materials are inadequate, the board shall take appropriate action.

(b) The board shall contract with a sponsor review oversight board (SROB) composed of five (5) persons designated by the CPE Committee. The board shall set compensation of SROB members from revenue received from sponsors requesting review.

(1) Each member of the SROB must be CPA in good standing with the board.

(2) An SROB member must recuse himself or herself from service if the member has an interest in the sponsoring organization under review or if the member believes he/she cannot be impartial or objective.

(3) An SROB member may not concurrently serve as a member of any state's board of accountancy or as a member of any state's CPA society's ethics committee or CPE committee.

(c) The SROB shall:

(1) monitor board-contracted sponsors of continuing professional education to provide reasonable assurance that quality continuing professional education is being offered in accordance with board contracts, standards and rules;

(2) review the policies and procedures of board-contracted CPE sponsors as to their conformity with the rules;

(3) when necessary, prescribe actions designed to assure correction of the deficiencies in the curriculum or CPE;

(4) report to the CPE committee concerning whether any board-contracted CPE sponsor is in compliance with board standards contracts and rules;

(5) communicate to the CPE committee on a recurring basis:

(A) problems experienced with sponsor compliance;

(B) problems experienced in the implementation of the review program; and

(C) a summary of the historical results of the SROB.

(d) The procedures used by the SROB in monitoring of sponsors of continuing professional education may include, but not be limited to:

(1) random visits of sponsors as deemed appropriate, and review of course materials;

(2) meetings with the sponsor to review educational materials and other record keeping documents;

(3) reviewing the sponsor's educational philosophy;

(4) reviewing, on the basis of a random selection, the course evaluations from licensees to determine whether the materials have received adverse comments;

(5) expanding the review of records if significant deficiencies, problems, or inconsistencies are encountered during the review of the materials;

(6) reviewing the applications submitted by the board-contracted CPE sponsors to determine that they will provide reasonable assurance of conforming to the minimum standards for offering high quality CPE; and

(7) determining that courses offered by board-contracted CPE sponsors provide that:

(A) education meets the needs of the licensees;

(B) course material is up-to-date and relevant; and

(C) adequate record keeping procedures are in place and specified occurrences requiring consultation are outlined.

This 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 July 26, 2002.

TRD-200204646
Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-7848

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CHAPTER 527. QUALITY REVIEW

22 TAC §§527.1 - 527.11

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas State Board of 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 §§527.1 through 527.11, concerning Quality Review.

The proposed repeal of §§527.1 through 527.11 will facilitate the incorporation of new terminology and substantive changes to peer review rules in a less cumbersome manner than amending the rules.

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 repealed rules will have no effect because the repealed rules are being replaced with new rules re-written to comply with amendments to the Public Accountancy Act.

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 repealed rules will have no effect because the repealed rules are being replaced with new rules re-written to comply with amendments to the Public Accountancy Act.

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 repealed rules will have no effect because the repealed rules are being replaced with new rules re-written to comply with amendments to the Public Accountancy Act.

Mr. Treacy has determined that for the first five-year period the repeal is in effect the public benefits expected as a result of the proposed repeal will be new rules that are better suited to administering the peer review program.

The probable economic cost to persons who are required to comply with the repeal will be zero because the repealed rules will have no effect because the repealed rules are being replaced with new rules re-written to comply with amendments to the Public Accountancy Act.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed repeal will not affect a local economy.

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 Friday, August 30, 2002. 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 repeal will not have an adverse economic effect on small businesses because the repealed rules will have no effect because the repealed rules are being replaced with new rules re-written to comply with amendments to the Public Accountancy Act.

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, Tex. Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.159 which authorizes the Board to adopt rules regarding the peer review program.

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

§527.1. Establishment of Quality Review Program.

§527.2. Purpose.

§527.3. Definitions.

§527.4. Quality Review Program.

§527.5. Exemptions.

§527.6. Reporting to the Board.

§527.7. Retention of Documents Relating to Peer Reviews

§527.8. Oversight Procedures to be Followed by the Quality Review Oversight Board.

§527.9. Procedures for a Sponsoring Organization.

§527.10. Peer Review Report Committee.

§527.11. Responsibilities of Peer Review Report Committee.

This 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 July 26, 2002.

TRD-200204647
Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-7848

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CHAPTER 527. PEER REVIEW

22 TAC §§527.1 - 527.11

The Texas State Board of Public Accountancy (Board) proposes new §§527.1 through 527.11, concerning Peer Review.

The new rules will incorporate new terminology and procedures arising from amendments to the Public Accountancy Act.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed new rules will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the new rules will be zero because the new rules function in the same manner as their repealed predecessor rules.

B. the estimated reduction in costs to the state and to local governments as a result of enforcing or administering the new rules will be zero because the new rules function in the same manner as their repealed predecessor rules.

C. the estimated loss or increase in revenue to the state as a result of enforcing or administering the new rules will be zero because the new rules function in the same manner as their repealed predecessor rule.

Mr. Treacy has determined that for the first five-year period the new rules are in effect the public benefits expected as a result of adoption of the proposed new rules will be the proper administration of peer review provisions of the amendments to the Public Accountancy Act.

The probable economic cost to persons required to comply with the new rules will be zero because the new rules function in the same manner as their repealed predecessor rules.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed new rules will not affect a local economy.

The Board requests comments on the substance and effect of the proposed new rules from any interested person. Comments

must be received at the Board no later than noon on Friday, August 30, 2002. 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 new rules will not have an adverse economic effect on small businesses because the new rules function in the same manner as their repealed predecessor rules.

The Board specifically invites comments from the public on the issues of whether or not the proposed new rules will have an adverse economic effect on small business; if the new rules are 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 new rules are 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 rules 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 rules are proposed under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act and §901.159 which authorizes the Board to adopt rules regarding the peer review program.

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

§527.1. Establishment of Peer Review Program.

(a) Pursuant to the Public Accountancy Act, §901.159, the board establishes a peer review program to monitor CPA's compliance with applicable accounting and auditing standards adopted by generally recognized standard-setting bodies. The program shall emphasize education, including appropriate remedial procedures, which may be recommended or required where reporting does not comply with professional standards. In the event a firm does not comply with established standards, or a firm's professional work is so inadequate as to warrant disciplinary action, the board shall take appropriate action to protect the public interest.

(b) This chapter shall not require any firm to become a member of any sponsoring organization.

§527.2. Definitions.

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

(1) Review or review program--The review conducted under the peer review program.

(2) Review year--The review covers a one-year (twelve-month) period. Engagements selected for review normally would have periods ending during the year under review.

(3) Sponsoring organization--An entity that meets the standards specified by the board for administering the review. The board shall periodically publish a list of sponsoring organizations, which have been approved by the board.

(4) Special reports--Includes but is not limited to reports issued under professional standards in connection with the following:

(A) specified elements, accounts, or items of a financial statement;

(B) compliance with aspects of contractual agreements or regulatory requirements related to audited financial statements;

(C) financial presentations to comply with contractual agreements or regulatory provisions;

(D) financial information presented in prescribed forms or schedules that require a prescribed form of auditor's reports; or

(E) internal audits by a firm for a client or a governmental entity.

§527.3. Standards for Peer Reviews and Sponsoring Organizations.

(a) The board adopts "Standards for Performing and Reporting on Peer Reviews" promulgated by the American Institute of Certified Public Accountants, as its minimum standards for review of firms.

(b) Qualified sponsoring organizations shall be the SEC Practice Section (SECPS), American Institute of Certified Public Accountants (AICPA) Peer Review Program, state CPA societies fully involved in the administration of the AICPA Peer Review Program, National Conference of CPA Practitioners (NCCPAP), and such other entities which are approved by the board.

§527.4. Enrollment and Participation.

(a) Participation in the program is required of each firm licensed or registered with the board that performs any attest service or any accounting and/or auditing engagements, including, audits, reviews, compilations, forecasts, projections, or other special reports. A firm which issues only compilations where no report is required under the Statements on Standards for Accounting and Review Services is required to participate in the program.

(b) A firm which does not perform services as set out in §527.4(a) shall annually submit a request for the exemption in writing to the board with an explanation of the services offered by the firm. A firm which begins providing services as set out in §527.4(a) shall notify the board of the change in status within 30 days and provide the board with enrollment information within 12 months of the date the services were first provided and have a review within 18 months of the date the services were first provided.

(c) Each firm required to participate under §527.4(a) shall enroll in the program of an approved sponsoring organization within one year from its initial licensing date or the performance of services that require a review. The firm shall adopt the review due date assigned by the sponsoring organization, and must notify the board of the date within 30 days of its assignment. In addition, the firm shall schedule and begin an additional review within three years of the previous review's due date, or earlier as may be required by the sponsoring organization. It is the responsibility of the firm to anticipate its needs for review services in sufficient time to enable the reviewer to complete the review by the assigned review due date.

(d) In the event that a firm is merged, otherwise combined, dissolved, or separated, the sponsoring organization shall determine which firm is considered the succeeding firm. The succeeding firm shall retain its peer review status and the review due date.

(e) The board will accept extensions granted by the sponsoring organization to complete a review, provided the board is notified by the firm within 20 days of the date that an extension is granted.

(f) A firm that has been rejected by a sponsoring organization for whatever reason must make an application to the board and receive authorization to enroll in a program of another sponsoring organization.

(g) A firm choosing to change to another sponsoring organization may do so provided that the firm authorizes the previous sponsoring organization to communicate to the succeeding sponsoring organization any outstanding corrective actions related to the firm's most recent review. Any outstanding actions must be cleared and outstanding fees paid prior to transfer between sponsoring organizations.

§527.5. Effect of Successive Substandard Reviews.

(a) A firm, including a succeeding firm, which receives two consecutive:

(1) modified and/or adverse system on engagement reviews;

(2) report reviews with significant issues, or

(3) any combination thereof shall have an accelerated review within eighteen months of the firm's last review.

(b) If that accelerated review results in a modified, or adverse report or a report review with significant issues:

(1) the firm may complete attest engagements for which field work has already begun only if:

(A) Prior to issuance of any report, the engagement is reviewed and approved before it is issued by a third party reviewer acceptable to the chairman of the Technical Standards Review Committee; and

(B) the engagement is completed within thirty days of the acceptance of the peer review report, letter of comments (LOC), and letter of response (LOR) by the sponsoring organization; and

(2) the firm shall not perform any other attest service including any accounting and/or auditing engagements, including, audits, reviews, compilations (as well as compilations where no report is required), forecasts, projections, or other special reports for a period of three years or until given permission by the board, whichever is sooner.

(c) A firm may petition the board for a waiver from the provisions of this rule.

(d) The board in its discretion may refer a firm which has received an adverse review or a report review with significant issues for discipline under the Act.

§527.6. Reporting to the Board.

(a) A firm shall submit to the board:

(1) a copy of the report and the final letter of acceptance (FLOA) from the sponsoring organization, if such report is unmodified with or without comments; or

(2) a copy of the report, letter of comments (LOC), letter of response (LOR), the conditional letter of acceptance (CLOA), and FLOA if the report is modified in any respect or adverse;

(3) a copy of the report, and LOR, if any, in a report review including any significant action in the CLOA and FLOA and the unqualified written commitment from the firm under review that it accepts the finding of the reviewer and that it will implement any follow up actions recommended;

(4) a copy of any notice from the sponsoring organization that a report review contains significant issues.

(b) Any report or document required to be submitted under subsection (a) of this section shall be filed with the board within ten days of receipt of the notice of acceptance by the sponsoring organization.

(c) Any document submitted to the board under this section is confidential pursuant to the Act.

(d) The reviewed firm or sponsoring organization shall complete the Texas State Board of Public Accountancy Peer Review Compliance Reporting Form. The form shall be filed with the board upon final acceptance of the review by the sponsoring organization. All the information requested on the form shall be provided. The firm shall complete the appropriate portions of the form. The form and all required letters shall be filed with the board within ten days of receipt of the final letter of acceptance (FLOA).

§527.7. Peer Review Oversight Board.

(a) The board shall retain a peer review oversight board (PROB) for the purpose of:

(1) monitoring sponsoring organizations to provide reasonable assurance that peer reviews are being conducted and reported on in accordance with peer review minimum standards;

(2) reviewing the policies and procedures of sponsoring organization applicants as to their conformity with the peer review minimum standards; and

(3) reporting to the board on the conclusions and recommendations reached as a result of performing functions in paragraphs (1) and (2) of this subsection.

(b) Information concerning a specific firm or reviewer obtained by the PROB during oversight activities shall be confidential, and the firm's or reviewer's identity shall not be reported to the board. Reports submitted to the board will not contain information concerning specific firms or reviewers. Members of the PROB may be required to execute a confidentiality statement for the sponsoring organization which they oversee.

(c) The PROB shall consist of three members, none of whom is a current member of the board. Compensation of PROB members shall be set by the board.

(d) The PROB shall make an annual recommendation to the board as to the continuing qualifications of the approved sponsoring organization as an approved sponsoring organization on the basis of the results of the following procedures:

(1) Where the sponsoring organization is the AICPA Division for CPA Firms SEC Practice Section (SECPS), the PROB shall review the published annual report of the Public Oversight Board or its successor and conclude whether the procedures carried out by the Public Oversight Board or its successor and the disclosures contained in the annual report are indicative of an acceptable level of oversight. Based on the results of its review, the PROB shall make an annual recommendation to the board as to the continuing qualifications of SECPS as an approved sponsoring organization.

(2) Where the sponsoring organization is other than SECPS, the PROB shall perform the following functions:

(A) The PROB shall visit each sponsoring organization as PROB deems appropriate.

(B) During such visits, the PROB shall:

(i) meet with the organization's peer review committee during the committee's consideration of peer review documents;

(ii) review the organization's procedures for administering the peer review program;

(iii) review, on the basis of a random selection, a number of reviews performed by the organization to include, at a minimum, a review of the report on the peer review, the letter of comments

(if any), the firm's response to the matters discussed in the letter of comments, the sponsoring organization's letter of acceptance outlining any additional corrective or monitoring procedures, and the required technical documentation maintained by the sponsoring organization on the selected reviews; the purpose of review by the PROB is to determine whether the reviews are being conducted and reported on in accordance with the peer review minimum standards; and

(iv) expand the review of peer review documents if significant deficiencies, problems, or inconsistencies are encountered during the review of the materials.

(e) In the reviewing of policies and procedures of sponsoring organization applicants, the PROB shall perform the following procedures:

(1) review the policies as drafted by the applicant to determine that they will provide reasonable assurance of conforming with the minimum standards for peer reviews;

(2) review the procedures as proposed by the applicant to determine that they will encompass the following:

(A) reviewers assigned are appropriately qualified to perform the review for the specific firm;

(B) reviewers are provided with appropriate materials;

(C) applicant has provided for consulting with the reviewers on problems arising during the review and that specified occurrences requiring consultation are outlined;

(D) applicant has provided for the review of the results of the review; and

(E) applicant has provided for an independent report acceptance body that meets the standards for peer review; the report acceptance body shall consider and accept the results of the review; the report acceptance body should also require corrective actions of firms with significant deficiencies noted in the review process;

(3) make recommendations to the board as to approval of the applicant as a sponsoring organization.

§527.8. Retention of Documents.

(a) Each reviewer shall maintain in the files all documentation necessary to establish that each review conformed to the review standards of the relevant review program, including the review working papers, copies of the review report, any comment letters, and any correspondence indicating the firm's concurrence, non-concurrence, and any proposed remedial actions and any related implementation.

(b) The documents described in subsection (a) of this section shall be retained in the reviewer's office for a period of time corresponding to the retention period of the sponsoring organization, and upon request of the Peer Review Oversight Board, shall be made available. In no event shall the retention period be less than 90 days from the date of acceptance of the review by the sponsoring organization.

§527.9. Procedures for a Sponsoring Organization.

(a) To qualify as a sponsoring organization, an entity must submit a peer review administration plan to the board for review and approval by the Peer Review Oversight Board (PROB). The plan of administration must:

(1) establish a peer review report committee (PRRC) and subcommittees as needed, and provide professional staff as needed for the operation of the peer review program;

(2) establish a program to communicate to firms participating in the peer review program the latest developments in peer review standards and the most common findings in the peer reviews conducted by the sponsoring organization;

(3) establish procedures for resolving any disagreement, which may arise out of the performance of a peer review;

(4) establish procedures to resolve matters which may lead to the dismissal of a firm from the peer review program, and conduct hearings pursuant to those procedures;

(5) establish procedures to evaluate and document the performance of each reviewer, and conduct hearings, which may lead to the disqualification of a reviewer who does not meet the AICPA standards;

(6) require the maintenance of records of peer reviews conducted under the program in accordance with the records retention rules of the AICPA; and

(7) provide for periodic reports to the PROB on the results of the peer review program.

(b) A sponsoring organization is subject to review by the board and the PROB.

§527.10. Peer Review Report Committee.

A peer review report committee (PRRC) is comprised of CPAs practicing public accountancy and formed by a sponsoring organization for the purpose of accepting peer review reports submitted by firms on peer review engagements.

(1) Each member of a PRRC must be active in the practice of public accountancy at a supervisory level in the accounting or auditing function while serving on the committee. The member's firm must be enrolled in an approved practice-monitoring program and have received an unmodified report on its most recently completed peer review. A majority of the committee members must satisfy the qualifications required of system peer review team captains as established and reported in the AICPA Standards for Performing and Reporting on Peer Reviews, paragraph 92.

(2) Each member of the PRRC must be approved for appointment by the governing body of the sponsoring organization.

(3) In determining the size of the PRRC, the requirement for broad industry experience, and the likelihood of some members needing to recuse themselves during the consideration of some reviews as a result of the members' close association to the firm or having performed the review, shall be considered.

(4) No more than one PRRC member may be from the same firm.

(5) The PRRC members' terms shall be staggered to provide for continuity.

(6) A PRRC member may not concurrently serve as:

(A) a member of any state's board of accountancy; or

(B) a member of any state's CPA society's ethics committee.

(7) A PRRC member may not participate in any discussion or have any vote with respect to a reviewed firm when the committee member lacks independence as defined in §501.70 of this title (relating to Independence) or has a conflict of interest. Examples of conflicts of interest include, but are not limited to:

(A) the member's firm has performed the most recent peer review of the reviewed firm's accounting and auditing practice;

(B) the member served on the review team, which performed the current or the immediately preceding review of the enrolled firm;

(C) the member believes he cannot be impartial or objective.

(8) Each PRRC member must comply with the confidentiality requirements of §901.161 of the Act. The sponsoring organization may annually require its PRRC members to sign a statement acknowledging their appointments and the responsibilities and obligations of their appointments.

(9) A PRRC decision to accept a report must be made by not fewer than three members who satisfy the above criteria.

§527.11. Responsibilities of Peer Review Report Committee.

The PRRC shall:

(1) establish and administer the sponsoring organization's peer review program in accordance with the AICPA Standards for Performing and Reporting on Peer Reviews;

(2) when necessary in reviewing reports on peer reviews, prescribe actions designed to assure correction of the deficiencies in the reviewed firm's system of quality control policies and procedures;

(3) monitor the prescribed remedial and corrective actions to determine compliance by the reviewed firm;

(4) resolve instances in which there is a lack of cooperation and agreement between the committee and review teams or reviewed firms in accordance with the sponsoring organization's adjudication process;

(5) act upon requests from firms for changes in the timetable of their reviews;

(6) appoint members to subcommittees and task forces as necessary to carry out its functions;

(7) establish and perform procedures for insuring that reviews are performed and reported on in accordance with the AICPA Standards for Performing and Reporting on Peer Reviews;

(8) establish a report acceptance process, which facilitates the exchange of viewpoints among committee members; and

(9) communicate to the governing body of the sponsoring organization on a recurring basis:

(A) problems experienced by the enrolled firms in their systems of quality control as noted in the peer reviews conducted by the sponsoring organization;

(B) problems experienced in the implementation of the peer review program; and

(C) a summary of the historical results of the peer review program.

(10) identify to the firm and the board which report reviews contain significant issues.

This 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 July 26, 2002.

TRD-200204648

Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-7848

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PART 25. STRUCTURAL PEST CONTROL BOARD

CHAPTER 599. TREATMENT STANDARDS

22 TAC §599.11

The Structural Pest Control Board proposes amendments to §599.11, concerning fumigation requirements. The proposal adds notification requirements by specified telephone number, fax number or e-mail at least four (4) hours, and no more than twenty four (24) hours prior to fumigation. The proposal also requires 16 hours of training per year and specifies that training records be kept in business file for two years, and made available to Board personnel upon request.

Dale Burnett, 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 to small businesses. There will be no cost comparison for cost per employee, cost per hour of labor or cost per $100 of sales for small or larger businesses.

Dale Burnett, 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 strengthening of the fumigation requirements for the better of the structural pest control industry and the protection of the public at large. There are no anticipated economic costs to individuals who are 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. Telephone No. (512) 451-7200.

The amendment is proposed under Article 135b-6, Tex.Rev.Civ.Stat.Ann., which provides the Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

There is no statute, article or code affected by this rule.

§599.11. Structural Fumigation Requirements.

(a) - (n) (No change.)

(o) Notice of all structural fumigations with contracts requiring treatment of a structure must be called, emailed, or faxed to the Structural Pest Control Board between the hours of 6:00 a.m. and 9:00 p.m. using the specified telephone number, email address or fax number at least four (4), and no more than twenty four (24) hours prior to the structural fumigation application. The licensee must provide address and site location, chemical to be used, date and time of treatment, approximate cubic footage under contract and the name and physical address of the business licensee. If the structural fumigation is cancelled, notice of the cancellation must be sent using the Board specified

telephone number, email address or fax number within one to six hours of the time the licensee learns of the cancellation. Any violation of 22 TAC 599.11(o) will result in an administrative penalty of not less than $3000 per violation and is considered a base penalty 3.

(p) Certified applicators and technicians must conduct/perform at least three structural or commodity fumigation jobs per year or sixteen (16) hours of training per year. A verifiable performance/training record form will be made available to the Board upon request. These performance/training record forms shall be kept on a format prescribed by the Board in the business file for at least two (2) years after termination of employment. The verifiable performance/training record forms will be made available to the certified applicator or technician upon written request.

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

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Dale Burnett
Executive Director
Structural Pest Control Board
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 451-7200

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 1. TEXAS BOARD OF HEALTH
SUBCHAPTER A. PROCEDURES AND POLICIES

25 TAC §§1.5 - 1.7

The Texas Department of Health (department) proposes amendments to §§1.5 - 1.7 concerning procedures and policies of the Board of Health (board). Specifically, the sections address meetings of the board, actions requiring board approval, and the Commissioner of Health (commissioner).

In §1.5(d), the amendment will delete the unnecessary requirement for the vice-chair of the board to sign minutes of meetings. In §1.6(e), the amendments will require that certain personnel appointments be subject to approval of the board. The appointments listed in §1.6(e) reflect revisions in the organization of the department and give flexibility for future revisions in the organization. The amendment to §1.6(f) will delete the requirement for a board subcommittee to review contract activities involving payment greater than $1 million. Major contracting activity is now included in the quarterly financial report presented to the board. In §1.7(b)(1) and (2), the powers and duties of the commissioner are revised to reflect the motion of the board adopted in October 2001 delegating powers and duties to the commissioner. In §1.7(b)(3), the language is revised to reflect that the commissioner may hire and supervise personnel of the department, not just personnel subject to board approval. In §1.7(b)(4), the amendment allows the commissioner to delegate at his option to the executive deputy commissioner, the chief operating officer, and the chief financial officer the authority to execute contracts involving payment greater than $1 million. This will allow for more expeditious execution of those contracts, particularly in the absence of the commissioner. In §1.7(b)(5), the requirements relating to the board's subcommittee on contracts will be deleted.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the amended sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

Ms. Steeg has determined that for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be board oversight of the hiring of executive management positions, more flexibility in reporting to the board of major contracting activities, and more flexibility in the execution of certain contracts. There will be no effect on small businesses or micro-businesses because the sections only apply to the board, the commissioner, and the department. There are no economic costs to persons who are required to comply with the sections as proposed. There will be no effect on local government.

Comments on the proposal may be submitted to Susan K. Steeg, General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, Susan.Steeg@tdh.state.tx.us. Comments will be accepted for 60 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §12.001 which provides the board with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the commissioner.

The amendments affect the Health and Safety Code, §12.001.

§1.5. Meetings of the Board of Health.

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

(d) The board shall keep official minutes of the meetings as required by the Open Meetings Act. The Office of the Board of Health shall prepare the minutes, the board must approve them, and the chair [~~and vice-chair~~] must sign them. Before the board approves them, the minutes shall be sent to each member for review, comment, or correction prior to approval. The official minutes of all board meetings are kept in the Office of the Board of Health and are available for public review as authorized by the Open Meetings Act.

(e) (No change.)

§1.6. Actions Requiring Board Approval.

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

(e) Of those appointments made by the commissioner, the following shall be subject to the approval of the board:

(1) the executive deputy commissioner of the department; [~~and~~]

(2) the deputy commissioners of the department; [~~.~~]

(3) the chief operating officer;

(4) the chief financial officer; and

(5) a person appointed to a similar position to, but a different title from, any position listed in this subsection.

[(f) Contracts. The chair of the board shall appoint a subcommittee of no more than three members to review contract activities to which the department is a party, involving payment greater than $1 million. The subcommittee shall report major contract activity to the board on a quarterly basis.]

(f) [(g)] Other actions. The board may approve any other action by the commissioner or the department where the approval of the board is required by law, delegated by the commissioner of the Health and Human Services Commission, or requested by the commissioner.

§1.7. Commissioner of Health.

(a) (No change.)

(b) The commissioner of health shall:

(1) have the authority to exercise any power or duty imposed on the board by law, except that the power or duty to adopt rules or to appoint persons to advisory committees is not delegated. The board has all the powers, duties, and functions granted by law to the board, the commissioner of health, and the department, including the Texas Center For Infectious Disease and the South Texas Health Care System; [administer and enforce federal and state health laws applicable to the department by issuing orders, making decisions, awarding and executing contracts, and implementing the duties delegated or assigned to the commissioner of health by the board and the commissioner of the Health and Human Services Commission;]

(2) have all necessary and sufficient powers and duties which include, but are not limited to, the exercise of powers and duties to render final decisions and issue final orders in administrative actions and hearings, to award and execute contracts, to refer cases for litigation to the Office of the Attorney General or other appropriate officials, and to provide for the operation of the department. This delegation also includes the authority to further delegate powers and duties to staff of the department, either in writing, by policy, verbally, or any other method; [administer and implement department services, programs, and activities, maintain professional standards within the department, and represent the department as its chief executive. To accomplish this goal, the commissioner of health is authorized to hire and supervise personnel, establish appropriate organization, acquire suitable administrative, clinical, and laboratory facilities, obtain sufficient financial support, provide for the operation of the department, designate one or more employees of the department to sign and approve expenditure vouchers of the department, and further delegate to departmental personnel duties delegated or assigned by the board and the commissioner of the Health and Human Services Commission;]

(3) hire and supervise [all] personnel [subject to §1.6(e) of this title]; and

(4) execute all contracts to which the department is a party involving payment greater than $1 million. This duty may [not] be delegated by the commissioner of health in writing to the executive deputy commissioner, the chief operating officer, and the chief financial officer. [; and]

[(5) provide information to the board's subcommittee on contracts concerning contracting activities anticipated to be for payment greater than $1 million, including requests for proposals, invitations for bid, and other procurement activities.]

(c) (No change.)

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

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

TRD-200204594
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: October 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 1. TEXAS BOARD OF HEALTH

The Texas Department of Health (department) proposes the repeal of §1.71, concerning use of departmental facilities by public health-related organizations and public health employees; and §1.161, concerning proof of payment of franchise taxes by corporations contracting with the department or applying for a license from the department.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §§1.71 and 1.161 and has determined that reasons for adopting the sections no longer continue to exist.

The department published a Notice of Intention to Review for §§1.71 and 1.161 in the *Texas Register* on May 24, 2002 (27 TexReg 4594). No comments were received due to publication of this notice.

The department proposes to repeal §1.71 because there is no statutory requirement for the department to adopt a rule pertaining to the use of department facilities by public health related organizations and public health employees. There is an existing department policy, Executive Order XO-1003, concerning the use of department facilities by public health-related organizations and public employee organizations.

Section 1.161 was adopted to comply with the Texas Business Corporations Act, Art. 2.45, which prohibited state agencies from contracting with or licensing corporations that were delinquent in their franchise taxes, and with 1 Texas Administrative Code (TAC) §113.5(a)(13), which required that vendors seeking to contract with state agencies provide a certification with their bids that they were current on their franchise taxes. The 77th Legislature (2001) repealed the Texas Business Corporations Act, Art. 2.45 because other laws fulfill the same purpose. One TAC §113.5(a) was amended effective September 11, 2000, and no longer contains the requirement for the certification to accompany bids. Specific department licensing rules still require licensees to provide a certification or letter that they are current on their franchise taxes, and the department purchasing solicitation instruments require that applicants provide proof that they are current on their debts, including franchise taxes. In addition, the 77th Legislature (2001) enacted Government Code, §2252.903, Contracting with Persons Who Have Certain Debts or Delinquencies, which requires state agencies to determine whether any payment law prohibits the comptroller from paying a person before the agency enters into a written contract with that person. One of the payment laws cited in Government Code, §2252.903 is Government Code, §403.055(a), which prohibits the comptroller from issuing payment to a person whom a state agency has reported as being delinquent on their franchise taxes. Accordingly, the department has determined that there are sufficient

existing statutes and rules and that the section is no longer necessary.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the repeals of these sections are in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has determined that for each year of the first five years the repeal of §1.71 is in effect, the public benefit anticipated as a result of the repeal will be to eliminate a rule that is unnecessary because there is no statutory requirement for the rule. For each year of the first five years the repeal of §1.161 is in effect, the public benefit anticipated as a result of the repeal will be to eliminate a rule that is unnecessary because of changes in the existing laws. There will be no cost effects on microbusinesses or small businesses. This was determined by interpretation of the rules that microbusinesses or small businesses will not be required to alter their business practices as a result of the proposed repeals of these rules. There are no economic costs to persons who may be affected by the proposed repeals of these rules. There is no anticipated impact on local employment.

Comments on the proposed repeals may be submitted to Sara Richardson, Legal Assistant, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 7876-8783, (512) 458-7236, extension 6961 or by e-mail to Sara.Richardson@tdh.state.tx.us. Comments will be accepted for 30 days following publication of the proposed repeals of these sections in the *Texas Register*.

SUBCHAPTER E. USE OF DEPARTMENTAL FACILITIES

25 TAC §1.71

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

The repeal of this section is proposed under the Health and Safety Code §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal of this section affects the Health and Safety Code, Chapter 12, and implements Government Code, §2001.039.

§1.71. Use of Departmental Facilities.

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

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

TRD-200204588
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER M. PAYMENT OF FRANCHISE TAXES BY CORPORATIONS CONTRACTING WITH THE DEPARTMENT OR APPLYING FOR A LICENSE FROM THE DEPARTMENT

25 TAC §1.161

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

The repeal of this section is proposed under the Health and Safety Code §12.001, which provides the Texas Board of Health (board) with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal of this section affects the Health and Safety Code, Chapter 12, and implements Government Code, §2001.039.

§1.161. Delinquent Corporate Franchise Taxes.

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

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Susan Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER F. PETITION FOR THE ADOPTION OF A RULE

The Texas Department of Health (department) proposes the repeal of §1.81 and a new §1.81 concerning petition for the adoption of a rule.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §1.81 and has determined that reasons for adopting the section continue to exist because Government Code, §2001.021 requires each state agency to adopt a rule setting forth the procedure for an interested individual to petition the agency for adoption of a rule. The department determined that the rule would be more useful to interested individuals if the language was simplified. The existing rule is proposed for repeal and a new version of the rule is being proposed without changes to the underlying policy.

The department published a Notice of Intention to Review §1.81 in the *Texas Register* on May 24, 2002. No comments were received concerning the publication of notice.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the sections are in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to provide a procedure for interested parties to petition the agency for a rule. There will be no cost effects on microbusinesses or small businesses. This was determined by interpretation of the rules that

microbusinesses or small businesses will not be required to alter their business practices in order to comply with the rules as proposed. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Joan Carol Bates, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3783, (512) 458-7236, or by electronic mail to joan.bates@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

25 TAC §1.81

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

The repeal is proposed under the Health and Safety Code, §12.001 which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12, and implements Government Code, §2001.039.

§1.81. Petition for the Adoption of a Rule.

This 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-200204599
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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25 TAC §1.81

The new rule is proposed under the Health and Safety Code, §12.001 which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The new section affects the Health and Safety Code, Chapter 12, and implements Government Code, §2001.039.

§1.81. Petition for the Adoption of a Rule.

(a) Purpose. The purpose of this section is to provide procedures for any interested person to request the Texas Board of Health (board) to adopt a rule.

(b) Form of the petition.

(1) The petition must be in writing.

(2) The petition must contain the following:

(A) the petitioner's name, address, and organization or affiliation, if any;

(B) a plain and brief description about why a rule or change to an existing rule is needed, required or desirable, including the public good to be served and any affect on those who would be required to comply with the rule;

(C) an estimated fiscal impact of the rule on state and local government, separately stated, in first five years of its implementation; and an estimated economic impact on persons required to comply with the rule for the first five years the rules are in effect;

(D) a statement of the board's authority to adopt the proposed rule;

(E) if the petition proposes to amend an existing rule, the text of the existing rule, with proposed changes clearly indicated within the existing text; and

(F) if the petition is for a new rule, the proposed text of the new rule.

(c) The petition must be addressed to the Commissioner of Health, and be mailed or hand delivered to the Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(1) The commissioner will review the petition for compliance with the requirements in subsection (b) of this section. The petition may be refused if these requirements are not met.

(2) If the requirements of subsection (b) are met, the commissioner will bring the petition to the board.

(d) The board must deny or accept the petition in whole or in part and initiate the rulemaking process within 60 days from the date the petition is received by the department.

(1) If the board denies the petition, the commissioner will notify the petitioner in writing of the board's action to deny and state the reason(s) for the denial.

(2) If the board accepts the petition, the commissioner will refer the petition to the appropriate program to initiate the rulemaking process under Government Code, Chapter §2001, Subchapter B.

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

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Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER O. PROCUREMENT OF PROFESSIONAL SERVICES

25 TAC §1.181

The Texas Department of Health (department) proposes an amendment to §1.181 concerning procurement of professional services.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §1.181 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review §1.181 in the *Texas Register* on May 24, 2002 (27 TexReg 4594). No comments were received due to publication of this notice.

The Health and Safety Code, §12.0121, provides that the department may select professional services based on competitive bids or, in the alternative, through the method of judging qualifications and accepting the price as long as it does not exceed the usual and customary fees for the services to be performed. However, the Government Code, Chapter 2254, provides that governmental entities may not select professional services based on competitive bids and must make a selection based on qualifications and ascertain that the fees are within an acceptable parameter set by the appropriate trade association. In a conflict between statutory provisions, the Government Code, Chapter 311, Code Construction Act, provides that the special provision prevails over the general provision, unless the general provision is the later enactment and contains a manifest intent to prevail over previous provisions. Chapter 2254 does not include such a provision; therefore, the special provision applies to the department.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the section is in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be to provide a means by which the public can better understand the methods used by the department to procure professional services. There will be no cost effects on micro-businesses or small businesses. This was determined by interpretation of the rules that micro-businesses or small businesses will not be required to alter their business practices in order to comply with the rule as proposed. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Mary Ann Slavin, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3783, (512) 458-7236 or by e-mail to the following address: maryann.slavin@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment is proposed under the Health and Safety Code, §12.0121, which provides the Texas Board of Health (board) by rule, shall adopt a list of categories of authorized providers and the means for procurement of the professional services of those providers; and Health and Safety Code, §12.001, which provides the board with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the commissioner.

The amendment implements the Health and Safety Code, Chapter 12, and complies with the requirement of Government Code, §2001.039.

§1.181. Grants and Contracts for Professional Services.

(a) (No change.)

(b) Definition. Professional services means those services performed by an individual who is licensed, certified, registered, or otherwise authorized under state law and who acts within the scope of the individual's license, certification, registration, or other authorization as defined by state law [~~, in the practice of his or her allied health profession~~].

(c) Categories of providers. This subsection covers some of the categories of licensed, certified, registered, or otherwise authorized providers under state law to whom the department may award a grant for professional services or with whom the department may contract or otherwise engage to perform professional services. These categories are in addition to other professional service categories but are listed to meet the requirements of the Texas Health and Safety Code, §12.0121. [~~The categories of providers, as described by the scope of their practice, as listed as follows:~~]

(1) audiology; [~~athletic training;~~]

(2) chiropractic services; [~~audiology;~~]

(3) optical services; [~~chemical dependency counseling;~~]

(4) dentistry; [~~chiropractic services;~~]

(5) medicine; [~~contact lens dispensing;~~]

(6) nursing; [~~dentistry;~~]

(7) nutrition; [~~marriage and family therapy;~~]

(8) radiology; [~~massage therapy;~~]

(9) pharmaceuticals; [~~medical radiologic technology;~~]

(10) podiatry; [~~medicine;~~]

(11) professional counseling; [~~nursing;~~]

(12) professional medical physics; [~~nutrition;~~]

(13) prosthetics; [~~optometry;~~]

(14) psychology; [~~orthotist;~~]

(15) respiratory therapy; [~~perfusionist;~~]

(16) social work; [~~pharmacy;~~]

(17) physical therapy;

(18) speech-language pathology; [~~podiatry;~~]

(19) emergency medical services; [~~professional counseling;~~]

(20) veterinary services; [~~professional medical physics;~~]

(21) rehabilitation; and [~~prosthetics;~~]

(22) any other category for which an individual is licensed, certified, registered, or otherwise authorized by the state and who is acting within the scope of the individual's license, certification, registration, or other authorization in the practice of a health or allied health profession. [~~psychology;~~]

[~~(23) physician assistant;~~]

[~~(24) respiratory therapy;~~]

[~~(25) sex offender treatment;~~]

[~~(26) social work;~~]

[~~(27) spectacle dispensing;~~]

[~~(28) speech-language pathology;~~]

[~~(29) emergency medical services;~~]

[~~(30) veterinary services;~~]

[~~(31) professional sanitartian services;~~]

[~~(32) hearing aid dispensers;~~]

[~~(33) occupational therapy; and~~]

[(34) ~~any other category for which an individual is licensed, certified, registered or otherwise authorized by the state and who is acting within the scope of the individual's license, certification, registration, or other authorization in the practice of a health or allied health profession.~~]

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

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

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Susan Steeg
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Texas Department of Health
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SUBCHAPTER S. REQUESTS FOR PROVIDING PUBLIC INFORMATION

25 TAC §1.251

The Texas Department of Health (department) proposes an amendment to §1.251, concerning procedures for handling requests for public information.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §1.251 and has determined that reasons for adopting the section continue to exist; however, changes were necessary as described in this preamble.

The department published a Notice of Intention to Review §1.251 in the *Texas Register* on March 2, 2001 (26 TexReg 1875). No comments were received due to publication of this notice.

Section 1.251(e) is being amended to add the words "promptly" pursuant to the Public Information Act, Government Code, §552.221(a), and "within a reasonable time" pursuant to Government Code, §552.301, regarding production of public information. Additionally, pursuant to Government Code, §552.2615, a required estimate of charges becomes necessary when a request for a copy of public information or a request to inspect records will result in the imposition of a charge that exceeds $40 in §1.251(e)(1).

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the section is in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be that staff will be able to handle public information requests promptly and efficiently. There will be no cost effects on micro-businesses or small businesses. This was determined by interpretation of the rule that micro-businesses or small businesses will not be required to alter their business practices in order to comply with the rule as proposed. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Patricia Reedy, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3783, (512) 458-7236 or by e-mail to Patricia.Reedy@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendment is proposed under the Public Information Act, Government Code, Chapter 552, relating to requests for public information; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects the Health and Safety Code, Chapter 12, and implements Government Code, §2001.039.

§1.251. Procedures for Handling Requests for Public Information.

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

(e) The program handling the request for public information must have the records ready for inspection or copies duplicated promptly or within a reasonable time, but no later than [~~within~~] 10 business days after the date the department received the request. If the program cannot produce the public information for inspection or duplication within 10 business days after the date the department received the request, the program will certify that fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

(1) Prior to the end of the 10 business days or the set date and hour, if applicable, the program will notify the requestor of the estimated costs if the costs will be over $40 [~~$100~~].

(2) - (7) (No change.)

(f) - (g) (No change.)

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

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Susan Steeg
General Counsel
Texas Department of Health
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CHAPTER 5. GRANTS AND CONTRACTS
SUBCHAPTER A. BLOCK GRANT PROGRAM

25 TAC §5.10

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

The Texas Department of Health (department) proposes the repeal of §5.10, concerning block grant hearing procedures.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 5.10 has been reviewed

and the department has determined that reasons for its adoption no longer continue to exist.

The department published a Notice of Intention to Review §5.10 as required by Government Code, §2001.039 in the *Texas Register* on February 12, 1999 (24 TexReg 1000). No comments were received as a result of the publication.

Section 5.10, concerning block grant hearing procedures, became effective December 24, 1984. The section has never been amended and is not currently enforced. The section is being repealed because the original reasons for its adoption in 1984 no longer continue to exist. Other rules and policies adopted specifically for each program now make hearings available to individuals who believe they have been unjustly denied benefits or services funded by block grants, whether funded by block grants or other sources. Additionally, the department is now required by law to attempt to resolve disputes with its contractors utilizing the process set forth in Government Code, Chapter 2260, which is an exclusive and required prerequisite if the legislature grants the contractor permission to sue the state.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the repeal is in effect, there will be no fiscal impact on state or local governments as a result of enforcing or administering the proposed repeal.

Ms. Steeg has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal of the section will be to clarify the department's rules by eliminating obsolete provisions. There will be no adverse economic effect on micro-businesses or small businesses because the department is already required by state law to attempt to resolve contract disputes utilizing the process described in Government Code, Chapter 2260, which supercedes the conflicting provisions of §5.10. There are no anticipated economic costs to persons who are required to comply with the repeal as proposed. There is no anticipated impact on local employment.

Comments on the proposed repeal may be submitted by mail to Michael Young, Assistant General Counsel, Texas Department of Health, Office of General Counsel, 1100 West 49th Street, Austin, Texas 78756-3783; by telephone at (512) 458-7236; or by e-mail at mike.young@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeal is proposed under Health and Safety Code, §12.001, which authorizes the Texas Board of Health (board) to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 12 and Government Code, Chapter 2260, and implements Government Code, §2001.039.

§5.10. Block Grant Hearing Procedures.

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

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TRD-200204609

Susan Steeg
General Counsel
Texas Department of Health
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CHAPTER 13. HEALTH PLANNING AND RESOURCE DEVELOPMENT
SUBCHAPTER A. FEDERAL LAWS AND REGULATIONS GOVERNING TEXAS PUBLIC HEALTH SERVICES

25 TAC §§13.1 - 13.3

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

The Texas Department of Health (department) proposes the repeal of §§13.1 - 13.3, concerning federal laws and regulations governing Texas Public Health Services.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §§13.1 - 13.3 and has determined that reasons for adopting the sections no longer continue to exist.

The department published a Notice of Intention to Review §§13.1 - 13.3 in the *Texas Register* on January 7, 2000 (25 TexReg 218). No comments were received.

The rules are being repealed because the department is already subject to federal laws and regulations that §13.1 and §13.2 adopt by reference as the department accepts funding from the federal government. Section 13.3 is being repealed because its provisions are obsolete. The repeals of §§13.1 - 13.3 have no legal effect on the department's obligation to comply with federal law.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the repeals are in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of repealing the sections will be to ensure streamlining and updating of department rules. There will be no cost effects on micro businesses or small businesses because the proposed repeals will not require micro businesses or small businesses to make any changes in the way the businesses are conducted. There are no anticipated economic costs to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Elaine Snow, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3783, (512) 458-7236 or by e-mail to Elaine.Snow@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 12, and implement Government Code, §2001.039.

§13.1. Federal Laws Governing Texas Public Health Services.

§13.2. Federal Regulations Governing Texas Public Health Services.

§13.3. The Annual State Plan Progress Report.

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

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CHAPTER 29. PURCHASED HEALTH SERVICES

The Texas Department of Health (department) proposes the repeal of §§29.103, 29.503, 29.1103, 29.1126, 29.1127, 29.1504, 29.1603, 29.1703, 29.1803, 29.2103, and 29.2801 concerning purchased health services. Specifically, the sections address optometric services, recipient-initiated second opinions regarding physician services, medical care or services provided outside of Texas, in-home total parenteral hyperalimentation services, in-home respiratory therapy services, hearing aid services, nurse-midwife services, birthing center services, maternity clinic services, certified registered nurse anesthetists' services, and LoneSTAR select contracting process for inpatient hospital services.

In 1997, the Government Code, §531.021 was amended by the 75th Legislature. The amendment stated that the Health and Human Services Commission (commission) is responsible for adopting reasonable rules and standards governing the determination of fees, charges, and rates for Medicaid payments to providers. This provision became effective on September 1, 1997. Prior to that date, these functions primarily were performed by the department and other Medicaid operating agencies such as the Texas Department of Human Services and the Texas Department of Mental Health and Mental Retardation.

In order to implement the statutory change, the commission administratively transferred Medicaid reimbursement rate rules from the department to the commission. The transfer was published in the *Texas Register* on December 11, 1998 (23 TexReg 12660, 12663, 12697). The publication included a chart which showed the department rules in Title 25, Texas Administrative Code and the new placement of the rules in Title 1, Texas Administrative Code where other rules of the commission are located.

While some department rules were moved in their entirety to the commission's set of rules, there were some department rules that related to both Medicaid reimbursement rates and other Medicaid requirements, such as qualifications to be a provider of specified Medicaid services. In the latter case the rules which addressed qualifications or other issues, not just rates, were duplicated so that the rule remained in its location in Title 25, Texas Administrative Code and was duplicated in the commission's rules in Title 1, Texas Administrative Code. The sections proposed for repeal were duplicated.

Since the purchased health services programs were within the department's Medicaid programs which transferred to the commission effective September 1, 2001, the department no longer needs to retain these sections in Title 25, Texas Administrative Code. All of these sections are already located in Title 1, Texas Administrative Code which is the only appropriate place that these sections should be found.

A number of department rules were transferred to the commission as part of the transfer of the Medicaid programs. The transfer of those rules was published in the *Texas Register* on May 24, 2002 (27 TexReg 4561, 4572, 4598). Because the sections proposed for repeal had already been duplicated into the commission's rules in 1998 as part of the transfer of Medicaid reimbursement rate rules, these sections proposed for repeal were not affected by the 2002 transfer.

Susan K. Steeg, General Counsel, has determined that for each of the first five years the repeals are in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as result of repealing the sections is that the public will not be confused by rules that are no longer necessary for department programs and are already found in the appropriate place in the commission's rules. There will be no cost effect on micro-businesses or small businesses since the sections will not remain in effect. There are no anticipated economic costs for persons are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Linda Wiegman, Deputy General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, phone 512/458-7236, fax 512/458-7751, or e-mail Linda.Wiegman@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

SUBCHAPTER B. MEDICAID VISION CARE PROGRAM

25 TAC §29.103

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.103. Reimbursement of Optometric Services.

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204600
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER F. PHYSICIAN SERVICES

25 TAC §29.503

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.503. Recipient-Initiated Second Opinions.

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

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Susan Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER L. GENERAL ADMINISTRATION

25 TAC §§29.1103, 29.1126, 29.1127

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

The repeals are proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 12.

§29.1103. Medical Care or Services Provided Outside of Texas in Another State of the United States.
§29.1126. In-home Total Parenteral Hyperalimentation Services.
§29.1127. In-home Respiratory Therapy Services for Ventilator-Dependent Persons.

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

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Susan Steeg
General Counsel
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SUBCHAPTER P. HEARING AND SERVICES

25 TAC §29.1504

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.1504. Reimbursement for Hearing Aid Services.

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

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Susan Steeg
General Counsel
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SUBCHAPTER Q. NURSE-MIDWIFE SERVICES

25 TAC §29.1603

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.1603. Reimbursement.

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

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Susan Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER R. BIRTHING CENTER SERVICES

25 TAC §29.1703

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.1703. Reimbursement.

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

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Susan Steeg
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SUBCHAPTER S. MATERNITY CLINIC SERVICES

25 TAC §29.1803

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.1803. Reimbursement.

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

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Susan Steeg
General Counsel
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SUBCHAPTER V. CERTIFIED REGISTERED NURSE ANESTHETISTS' SERVICES

25 TAC §29.2103

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.2103. Reimbursement.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Susan Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER CC. LONESTAR SELECT CONTRACTING PROGRAM

25 TAC §29.2801

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

The repeal is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 12.

§29.2801. LoneSTAR Select Contracting Process for Inpatient Hospital Services.
This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200204608

Susan Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 35 PHARMACY SERVICES
SUBCHAPTER G. PHARMACY CLAIMS

25 TAC §35.709

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

The Texas Department of Health (department) proposes the repeal of §35.709 concerning pharmacy services. Specifically the section addresses standards for tape input service bureau companies by the Medicaid Vendor Drug Program.

Since the Vendor Drug Program was within the department's Medicaid programs which transferred to the Health and Human Services Commission (commission) effective September 1, 2001, the department no longer needs to retain this section in Title 25, Texas Administrative Code. Staff of the commission's Vendor Drug Program have confirmed that the section is no longer necessary.

A number of department rules were transferred to the commission as part of the transfer of the Medicaid programs. The transfer of those rules was published in the *Texas Register* on May 24, 2002 (27 TexReg 4561, 4573, 4598). The section proposed for repeal was not affected by the transfer since it was not a necessary rule for the commission.

Susan K. Steeg, General Counsel, has determined that for each of the first five years the repeal is in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has also determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as result of repealing the section is that the public will not be confused by a rule that is no longer necessary for department programs. There will be no cost effect on micro-businesses or small businesses since the section will not remain in effect. There are no anticipated economic costs for persons are required to comply with the repeal as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Linda Wiegman, Deputy General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, phone (512) 458-7236, fax (512) 458-7751, or e-mail Linda.Wiegman@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeal of the section is proposed under the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The repeal of the section affects the Health and Safety Code, Chapter 12.

§35.709. Standards for Tape Input Service Bureau Companies.

This 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 July 26, 2002.

200204597
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 73. LABORATORIES

The Texas Department of Health (department) proposes the repeal of §§73.1, 73.11, 73.21-73.24 and new §§73.11, 73.21, 73.22, 73.31, 73.41, and 73.51-73.55 concerning testing for a panel of arthropod-borne diseases; serologic testing for antibodies to human T-cell lymphotropic virus, Type III (HTLV-III); training of laboratorians; fees; sale of laboratory services; and certification of milk and shellfish laboratories.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 73.1, 73.11, and 73.21-73.24 have been reviewed and the department has determined that reasons for adopting the sections continue to exist in that rules on these subjects are needed; however the rules need revision as described in this preamble.

The proposed rules include editorial changes for the reorganization and renumbering of existing rules, increases to existing fees and new fees for clinical and environmental testing and other laboratory services such as food testing and the identification and testing of insects. The repeal of §§73.1, 73.11, 73.21-73.24 is necessary for editorial changes to the existing section numbering system. The language in new §73.11 includes editorial changes to repealed §73.24. New §73.21 outlines procedures for the purchase and use of newborn screening kits. New §73.22 contains only the fee schedule for the Certification and Accreditation of Environmental Laboratories. These fees were separated from other laboratory fees because this program and the rules associated with it transfer to the Texas Natural Resource Conservation Commission (TNRCC) on September 1, 2001. New §73.22 will be repealed when TNRCC completes their rule making process for administration of this program. New §73.31 provides general information about specimen submission. The language in new §73.41 is unchanged from repealed §73.21 with the exception of editorial changes necessary to correct a citation to the Health and Safety Code and the addition of definitions. New §73.51 describes how fees are determined for laboratory services and provides for their payment. Sections 73.52-73.55 contain the fee schedules for certification of milk and shellfish laboratories, special projects and training of laboratorians, clinical and environmental testing, and other laboratory services such as food testing and the identification and testing of insects. These sections include proposed new fees and increased maximum caps on existing fees.

The department published a Notice of Intention to Review for §§73.1, 73.11, 73.21 as required by Government Code, §2001.039 in the *Texas Register* on February 3, 1999 (24 TexReg 1002), and published a Notice of Intention to Review for

§§73.1, 73.11, 73.21, 73.22, 73.23, 73.24 in the *Texas Register* on April 13, 2001 (26 TexReg 2855). The department received no comments due to the publication of the notices.

Dr. Susan Neill, Chief, Bureau of Laboratories, has determined that for each year of the first five-year period the sections are in effect, there will be fiscal implications as a result of administering the sections as proposed. The estimated increase in revenues to the state for each year of the first five years the sections are in effect are $50,000, $75,000, $100,00, $125,000 and $250,000 respectively. These revenues will offset a portion of the costs of performing the laboratory tests. There will be no effect on existing contracts with other state agencies. There will be increased cost to local governments who are currently not paying for laboratory services.

Dr. Neill has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the availability of tests previously unavailable to local health departments, state agencies and contractors on a fee for service basis. There will be no cost to micro-businesses, small businesses or persons (other than to those that submit specimens for testing) to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be directed to Mrs. Sherry S. Clay, Director, Quality and Regulatory Affairs Division, Bureau of Laboratories, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

25 TAC §§73.1, 73.11, 73.21 - 73.24

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

The repeals are proposed under Health and Safety Code, §12.001, which provides the board the authority to adopt rules for the performance of every duty imposed by law on the board, by the department and commissioner of health, §12.031 and §12.032 which allows the board to charge fees to a person who receives public health services from the department, §12.034 which requires the board to establish collection procedures and §12.035 which required the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the Texas Department of Health public health service fee fund and §12.0122 which allows the department to enter into a contract for laboratory services.

The repeals affect Health and Safety Code, Chapter 12 and implement Government Code, §2001.039.

§73.1. Testing for a Panel of Arthropod-borne Diseases.

§73.11. Serologic Testing for Antibodies to Human T-Cell Lymphotropic Virus, Type III (HTLV-III).

§73.21. Training of Laboratorians.

§73.22. Fees.

§73.23. Sale of Laboratory Services.

§73.24. Certification of Milk and Shellfish Laboratories.

This 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 July 26, 2002.

200204686
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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25 TAC §§73.11, 73.21, 73.22, 73.31, 73.41, 73.51 - 73.55

The new sections are proposed under Health and Safety Code, §12.001, which provides the board the authority to adopt rules for the performance of every duty imposed by law on the board, by the department and commissioner of health, §12.031 and §12.032 which allows the board to charge fees to a person who receives public health services from the department, §12.034 which requires the board to establish collection procedures and §12.035 which required the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the Texas Department of Health public health service fee fund and §12.0122 which allows the department to enter into a contract for laboratory services.

The new sections affect Health and Safety Code, Chapter 12 and implement Government Code, §2001.039.

§73.11. Certification of Milk and Shellfish Laboratories.

(a) Purpose. This section establishes the procedures for milk and shellfish laboratories to become certified laboratories under federal or state law.

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

(1) Assessment--A fact-finding process performed by the Texas Department of Health (department) in which information and observations are collected and evaluated for the purpose of judging the laboratory's conformance with established certification standards. Assessment includes an onsite inspection.

(2) Certification--An official and legal approval granted by the department to a laboratory, permitting analysis of milk or shellfish samples in accordance with applicable federal and state laws and rules based on the process outlined in this section. Certification means that a certified laboratory has been judged capable of correctly performing the analyses for which it is certified. Certification does not imply or mean that the department certifies the results produced by the certified laboratory.

(c) Certification application.

(1) A laboratory must submit an application for certification directly to the department on a form specified by the department.

(2) Payment of the appropriate fee for certification under §73.52 of this title (relating to Fees for the Certification of Milk and Shellfish Laboratories) must accompany the application.

(3) Payment may be by check or money order made payable to the Texas Department of Health.

(4) A laboratory may apply for certification in a single category or any combination of categories from among the following: antibiotic milk laboratory, milk industry laboratory, full service milk laboratory or, shellfish laboratory.

(5) The department shall perform an assessment for each milk and shellfish laboratory applying for certification.

(6) Each certified laboratory must pay the appropriate certification fee. After initial certification, the laboratory will be assessed the certification fee on an annual basis.

(d) Standards.

(1) The minimum standards for certification are as specified by the United States Food and Drug Administration (FDA). These specifications are available for review during normal business hours at the department's Bureau of Laboratories, 1100 West 49th Street, Austin, Texas 78756-3199.

(2) Each applicant laboratory will be evaluated, at a minimum on the following factors: credentials and experience of staff, quality assurance plan, manuals of procedures, performance on evaluation unknowns, equipment, calibrations and standards, methodology, facilities, sample acceptance policies, sample tracking, record keeping, reporting, and results interpretation.

(e) Inspections. The department may conduct inspections of laboratories to ascertain adherence to minimum standards and the effectiveness of the certification system. For laboratories for which the department serves as both the assessing and certification authority, inspections will be conducted on at least a biennial basis.

(f) Withdrawal of certification.

(1) A laboratory must meet all minimum standards, pass all performance evaluation sets, and pass onsite inspection no less than every two years to be certified.

(2) A laboratory that fails to meet requirements by scoring outside the acceptable limits on a set of performance evaluation unknowns, has serious deficiencies at the time of an onsite inspection, fails to notify the department within 30 days of major changes which might impair analytical capability (personnel, equipment, or location), or fails to notify the state or public of certain problems as required by notification regulations may be placed on provisionally certified status.

(3) Failure on two consecutive performance evaluation sets or failure to correct major deficiencies following onsite inspection may result in the withdrawal of certification. The corrective action must take place within the time frames set by the appropriate federal regulatory authority, which are 90 days or less.

(4) Certification may be suspended or revoked immediately if the standards of the FDA require suspension or revocation, or if continued operation of the laboratory will jeopardize public health. Due process will be afforded to the laboratory whose certification is revoked or suspended.

(5) Certification shall be revoked for a laboratory that submits as its own work the results for analysis of any performance evaluation sample that was analyzed by a different laboratory. The laboratory may not reapply for certification for a period of not less than three years.

§73.21. Newborn Screening.

(a) Purpose. This section establishes procedures for the purchase and submission of newborn screening test kits provided by the Bureau of Laboratories (bureau) of the Texas Department of Health (department).

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

(1) Charity care newborn--A patient who is not insured and is not covered or eligible to be covered for newborn screening services by Medicaid or any other government program.

(2) Medicaid-eligible newborn--A patient whose mother is a Medicaid recipient or who is otherwise eligible for Medicaid coverage for the newborn-related services.

(3) Newborn Screening (NBS)--Newborn screening is a requirement of the Health and Safety Code, Chapter 33. Each newborn must have two screening panels performed. Additional screening panels may be necessary under certain circumstances.

(4) Provider--The hospital, birthing center, physician, midwife, or clinic that collects and submits the NBS specimen.

(5) Test kit--The department-designed collection device, demographic information form and envelope used to submit a newborn's blood specimens for screening by the bureau.

(c) Test kits.

(1) The department through the bureau will provide newborn screening test kits upon written request from a provider of newborn screening. A separate test kit is required for each screening panel.

(A) The department will provide test kits for Medicaid-eligible or charity care newborns at no cost to the provider.

(B) The department will provide test kits for all other newborns at a fee described in §73.54(1)(F) of this title (relating to Fee Schedule for Clinical Testing and Newborn Screening).

(2) When a provider requests test kits, the provider must identify the number estimated to be needed for Medicaid-eligible newborns, charity care newborns and other newborns. The provider's estimate shall be based on the provider's newborn screening services provided in the most recent fiscal or calendar year if the provider has previously provided these services. A provider shall provide further information upon request of the department to verify the appropriateness of the number of test kits provided at no cost. A provider may use the no-cost test kit only for a Medicaid-eligible or charity care newborn.

(3) The department will bill the requesting provider for test kits when the test kits are sent to the provider. Payment is due within 120 days from the provider's receipt of the test kits.

(4) The department shall accept only its test kits for submission of specimens.

(5) The provider shall ensure that the identifying and demographic information provided with the test kit is complete and accurate when submitted to the department.

§73.22. Fee Schedule for Certification and Accreditation of Environmental Laboratories.

(a) Environmental laboratory administrative fee--$460.

(b) Environmental laboratory microbiology category fee--$115.

(c) Environmental laboratory radiochemistry category fee--$430.

(d) Environmental laboratory chemistry category fee for a single category--$430.

(e) Environmental laboratory chemistry category fee for two categories--$860.

(f) Environmental laboratory chemistry category fee for three categories--$1290.

(g) Environmental laboratory chemistry category fee for four or more categories-- $1720.

§73.31. Specimen Submission.

(a) Specimens submitted to the Texas Department of Health (department) shall be in compliance with the Bureau of Laboratories (bureau) Manual of Reference Services (manual) and other written instructions established by the bureau.

(b) Failure to submit a specimen as required may result in the department's refusal to perform the requested services.

(c) The manual and other written instructions may be obtained upon request from the Texas Department of Health, Bureau of Laboratories, 1100 West 49th Street, Austin, Texas 78756-3199, (512) 458-7318 or from the bureau's website, http://www.tdh.state.tx.us/lab.

§73.41. Sale of Laboratory Services.

(a) Purpose. This section implements the provisions of the Health and Safety Code, §12.0122 concerning the sale of specific laboratory services by the Texas Department of Health (department) Bureau of Laboratories (bureau).

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

(1) Laboratory services--Include the evaluation and/or testing of samples submitted to the laboratory, certification of laboratories, training of laboratorians and special projects. Laboratory Services including special projects for which the department's bureau contracts under this section shall not include tissue and cytology specimens, except for pap smears for recipients under federally funded programs.

(2) Special projects--Include but are not limited to evaluating adequacy of new test procedures, analyzing samples by methods not routinely used or for analytes not routinely tested, special surveys and preparation of data packages.

(c) Charges. For each contract governed by Health and Safety Code, §12.0122 the charges for laboratory services shall be the reasonable charges negotiated by the department and the contracting party(s). The charges in a contract shall be sufficient to ensure the proper provision of the services to be performed and the reasonable recovery by the department of its costs relating to the contract.

(d) Other contracts. This section does not affect department contracts that are not governed by Health and Safety Code, §12.0122.

(e) Fees. This section does not affect the authority of the department to establish and collect fees for laboratory services under the Health and Safety Code, Chapter 12, Subchapter D, §§12.031-12.034.

§73.51. Fees.

(a) Purpose. This section establishes fees pursuant to the Health and Safety Code, §§12.0122, 12.032 and 12.034 for laboratory services provided by the Bureau of Laboratories (bureau) of the Texas Department of Health (department) and provides for their payment.

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

(1) All metals drinking water group--Aluminum, antimony, arsenic, barium, beryllium, total hardness (calculated), cadmium, calcium, chromium, copper, iron, lead, magnesium, manganese, mercury, nickel, selenium, silver, sodium, thallium, and zinc.

(2) Chlorinated pesticides and polychlorinated biphenyls (PCBs) in drinking water--Alachlor, aldrin, aroclor, atrazine, butachlor, chlordane, dieldrin, endrin, ethyl parathion, heptachlor, heptachlor epoxide, hexachlorobenzene, lindane, methoxychlor, methyl parathion, metolachlor, metribuzin, propachlor, simazine, toxaphene, and trifluralin.

(3) Fish tissue metals group--Arsenic, mercury, copper, selenium, cadmium, zinc, and lead.

(4) Gamma emitting isotopes--Be-7, Na-22, Na-24, Cl-38, K-40, Ar-41, K-42, Sc-44, Sc-46, V-48,Cr-51, Mn-54, Co-56, Mn-56, Co-57, Co-58, Fe-59, Co-4,Ni-65,Zn-65, Cu-67, Zn-69m, Se-75, As-76, Br-82,Rb-83, B-84, Kr-85, Kr-85m, Sr-85, Kr-87, Kr-88, Rb-88, Y-88, Kr-89, Rb-89, Zr-89, Mo-89,Sr-91,Y-91m, Sr-92, Y-92, Sr-93, Y-93, Nb-94,y-94, Nb-95, Nb-95m, Tc-95, Zr-95, Nb-96, Tc-96, Nb-97, Zr-97, Mo-99,Tc-99m, Ru-103, Rh-105, Ru-106, Ag-108m, Cd-109, Ag-110m, Sn-113, Sb-122, I-124, Sb-124, I-125, Sb-125, Xe-125, I-126, Sb-126, I-129, I130, I-131, Xe131m, I- 132, Te-132, Ba-133, I-133, Xe-133, Xe-133m, Cs-134, I-134, I-135, Xe-135, Xe-135m, Cs-136, Cs-137, Cs-138, Xe-138, Ba-139, Ce-139, Ba-140, La-140, Ce-141, Ce-143, Ce-144, Nd-147, Eu-152, Gd-153, Eu-154, Eu-155, Eu-156, Yb-169, Ta-178, Hf-181, Ta-182, W-187, Ir-192, Au-198, Hg-203 , Tl-208, Pb-210, Bi-211, Pb-211, Bi-212, Pb-212, Bi-214, Pb-214, Rn-219, Ra-226, Th-227, Ac-228, Pa-231, Th-231, Th-232, Pa-234, Pa-234m, Th-234, U-235, U-238, Am-241, and Cm-243.

(5) ICP/ICP-MS drinking water metals group--Aluminum, arsenic, barium, beryllium, total hardness (calculated), chromium, copper, iron, lead, magnesium manganese, nickel, silver, and zinc.

(6) Routine water mineral group--Alkalinity [~~total and phenolphthalein~~], chloride, conductance, fluoride, nitrate, pH, sulfate, and total dissolved solids.

(7) Semi-volatile organic compounds in fish--1,2,4,5-Tetrachlorobenzene, 1,2,3-trichlorobenzene, 1,2-dichlorobenzene, 1,3-dichlorobenzene, 1,4-dichlorobenzene, 2,4,5-trichlorophenol, 2,4,6-trichlorophenol, 2,4-dichlorophenol, 2,4-dimethylphenol, 2,4-dinitrophenol, 2,4-dinitrotoluene, 2,6-dinitrotoluene, 2-chloronaphthalene, 2-chlorophenol, 2-methylnaphthalene,2-methylphenol, 2-nitroaniline, 2-nitrophenol, 3,4-methylphenol, 3,3'-dichlorobenzidine, 3-nitroaniline, 4,5-dinitro-2-methylphenol, 4-bromophenyl-phenylether, 4-chloro-3-methylphenol, 4-chloraniline, 4-chlorophenyl-phenylether, 4-nitroaniline, 4-nitrophenol, acenaphthene, acenapthylene, aldrin, alpha-bhc, alpha-endosulfan, aniline, anthracene, benzidine, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(g,h,i)perylene, benzo(k)fluoranthene, benzoic acid, benzyl alcohol, beta-bhc, beta-endosulfan, bis(2-chloroethoxy)methane, bis(2-chloroethyl)ether, bis(2-chloroisopropyl)ether, bis(2-ethylhexyl)adipate, bis(2-ethylhexyl)phthalate, butylbenzylphthalate, chrysene, delta-bhc, dinbenz(a,h)anthracene, dibenzofuran, dieldrin, diethylphthalate, dimethylphthalate, di-n-butylphthalate, di-n-octylphthalate, diphenylhydrazine, endosulfan sulfate, endrin, endrin aldehyde, endrin ketone, fluoranthene, fluorene, heptachlor, heptachlor epoxide, hexachlorobenzene, hexachlorobutadiene, hexachlorocyclopentadiene, hexachloroethane, hexachlorophene, indent-(1,2,3-cd)pyrene, isophorone, lindane, napthalene, nitrobenzene, n-nitrosodiethylamine, n-nitrosodimethylamine, n-nitroso-di-n-butylamine, n-nitroso-di-n-propylamine, n-nitrosodiphenylamine, p,p'-ddd, p,p'-dde, p,p'-ddt, pentachlorophenol, phenanthrene, phenol, pyrene, pyridine.

(8) Volatile organic compounds (VOC).

(A) In air--1,1,1-Trichloroethane, 1,2,4-trimethylbenzene, 1,4-dichlorobenzene, 2-ethoxyethylacetate, 2-heptanone, 2-propanol, acetone, alpha-pinene, benzene, butoxyethanol, butyl acetate, chloroform, cumene (isopropyl benzene), cyclohexane, cyclohexanone, ethanol, ethyl acetate, ethyl methacrylate, ethyl benzene,

heptane, hexachloroethane, isoamyl acetate, iso-butanol, limonene, m/p-xylene, methyl ethyl ketone (MEK), methyl methacrylate, napththalene, n-propyl acetate, o-xylene, phenol, sec-butanol, styrene, tetrachloroethylene, tetrahydrofuran, toluene, trichloroethylene.

(B) In drinking water--

(i) Regulated compounds--1,1,1-Trichloroethane, 1,1,2-trichloroethane, 1,1-dichloroethene, 1,2,4-trichlorobenzene, 1,2-dichlorobenzene, 1,2-dichloroethane, 1,2-dichloropropane, 1,4-dichlorobenzene, benzene, carbon tetrachloride, chlorobenzene, cis-1,2-dichloroethene, ethyl benzene, m- and p- xylene, methylene chloride, o- xylene, styrene, tetrachloroethene, toluene, trans-1,2-dichloroethene, trichloroethene, vinyl chloride.

(ii) Monitor compounds--,1,1,2-Tetrachloroethane, 1,1,2,2-tetrachlorethane, 1,1-dichloroethane, 1,1-dichloropropene, 1,2,3-trichlorobenzene, 1,2,4-trichlorobenzene, 1,2-dibromo-3-chloropropane, 1,2-dibromoethane, 1,3,5-trimethylbenzene, 1,3-dichlorobenzene, 1,3-dichloropropane, 2,2-dichloropropane,2-chlorotoluene, 4-chlorotoluene, 4-isopropyltoluene, bromobenzene, bromochloromethane, Bromoform, bromomethane, chloromethane, chloroform, chloromethane, cis-1,3-dichloropropene, dibromochloromethane, dibromomethane, dichlorodifluoromethane, dichlorodifluoromethane, hexachlorobutadiene, isopropylbenzene, naphthalene, n-buthybenzene, n-propylbenzene, s-butylbenzene, t-butylbenzene, trans-1,3-dichloropropene, trichlorofluoromethane.

(iii) In fish--1,1,1,2-Tetrachloroethane, 1,1,1-trichloroethane, 1,1,2,2-tetrachloroethane, 1,1,2-trichloroethane, 1,1-dichloroethane, 1,1-dichloroethene, 1,1-dichloropropene, 1,2,3-trichlorobenzene, 1,2,3-trichloropropane, 1,2,4-trichlorobenzene, 1,2,4-trimethylbenzene, 1,2-dibromo-3-chloropropane, 1,2-dibromoethane, 1,2-dichlorobenzene, 1,2-dichloroethane, 1,2-dichloropropane, 1,3,5-trimethylbenzene, 1,3-dichlorobenzene, 1,3-dichloropropane, 1,4-dichlorobenzene, 2,2-dichloropropane, 2-butanone, 2-chlorotoulene, 2-hexanone, 4-chlorotoluene, 4-isopropyl toluene, 4-methyl-2-pentanone, acetone, acrylonitrile, benzene, bromobenzene, bromochloromethane, bromodichloromethane, bromoform, bromoethane, carbon disulfide, carbon tetrachloride, chlorobenzene, chloroethane, chloroform, chloromethane, cis-1,2-dichloroethene, cis-1,3-dichloropropene, dibromochloromethane, dibromomethane, dichlorodifluromethane, ethyl methacrylate, ethylbenzene, hexachlorobutadiene, iodomethane, isopropylbenzene, m-and p- xylene, methyl methacrylate, methyl tert-butyl ether, methylene chloride, napthalene, n-butylbenzene, n-propylbenzene, o- xylene, sec-butylbenzene, styrene, tert-butylbenzene, tetrachloroethane, tetrahydrofuran, toluene, trans-1,2-dichloroethene, trans-1,3-dichloropropene, trichloroethene, trichlorofluoromethane, vinyl chloride.

(iv) Other compounds--2-Butanone (MEK), 2-hexanone, 4-methyl-2-pentanone (MIBK), acetone, acrylonitrile, carbon disulfide, ethyl methacrylate, iodomethane, methyl methacrylate, methyl-t-butyl ether (MTBE), tetrahydrofuran, vinyl acetate.

(c) Determination of Fees.

(1) The fees assessed for a public health service may not exceed the cost to the department of providing the service.

(2) The fees related to the certification of milk and shellfish laboratories, training of laboratorians, testing of clinical and environmental samples and other laboratory services shall be calculated by department staff in accordance with paragraph (1) of this subsection.

(3) The board may establish a fee schedule. In establishing the schedule, the board shall consider a persons ability to pay the entire amount of a fee. A sliding scale for fee imposition may be used on the recipient of the service, and no one will be denied service because of an inability to pay.

(d) A schedule of all fees is available upon request from the Texas Department of Health, Bureau of Laboratories, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7318. It is also available online in the manual of reference services on the bureaus web site http://www.tdh.state.tx.us/lab.

(e) Payment of fees.

(1) The department will determine whether a fee must be paid with submission of the specimen or whether the department will bill later for the fee unless stated otherwise in this section.

(2) A fee paid is nonrefundable.

(f) Failure to pay a fee in a timely manner may result in the department's refusal to accept specimens or samples until the fee is paid.

(g) The department shall make reasonable effort to collect the fees, but the department may waive the collection if the administrative cost of collection will exceed the fee.

(h) Pursuant to Health and Safety Code, §12.035, the department is required to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the Texas Department of Health Public Health Service Fee Fund.

§73.52. Fees for the Certification of Milk and Shellfish Laboratories.

(a) Antibiotic milk laboratories--$350.

(b) Milk industry laboratories--$525.

(c) Full service milk laboratories--$685.

(d) Milk proficiency tests (non-Texas certified laboratories)--$375.

(e) Shellfish laboratory--$500.

(f) Re-certification or supplemental certification--$200.

§73.53. Fee Schedule for Training of Laboratorians.

Fees for training of laboratorians shall not exceed the following amounts:

(1) workshops--$150 per day; and

(2) individual, hands-on training--$150 per day.

§73.54. Fee Schedule for Clinical Testing and Newborn Screening.

Fees for clinical testing and newborn screening shall not exceed the following amounts.

(1) Human specimens.

(A) Bacteriology.

(i) Aerobic isolation, comprehensive--$95.

(ii) Anaerobic isolation, comprehensive--$75.

(iii) Bioterriorism:

(I) culture--$95; and

(II) smear--$15.

(iv) Bordetella pertussis:

(I) culture--$110; and

(II) molecular testing--$100.

(v) C. botulinum isolation--$75.

(vi) *C. difficile*--$95.

(vii) Diphtheria culture--$90.

(viii) Drug susceptibility testing:

(I) VRE (vancomycin resistant enterococcus)--$50; and

(II) VRSA (vancomycin resistant *Staphylococcus aureus*)--$50.

(ix) Enteric pathogens--$70.

(x) Fatty acid analysis--$50.

(xi) Genetic probe for gonorrhea/chlamydia (GC/CT)--$25.

(xii) Identification and typing:

(I) *E. coli, enterohemorrhagic E. coli* (EHEC), only--$102;

(II) *Hemophilus influenzae*--$95;

(III) *Neiseria meningitidies*--$95;

(IV) noncomplex typing (*Vibrio, Brucella*, etc.)--$50;

(V) other complex typing--$110;

(VI) *Salmonella*--$90;

(VII) *Shigella*--$58; and

(VIII) *Streptococcus*, Group A (GAS)--$70.

(xiii) Molecular studies:

(I) Pulsed-Field Gel Electrophoresis (PFGE)--$100; and

(II) polymerase chain reaction (PCR)--$45.

(xiv) Mycolic acid studies--$25.

(xv) *N. gonorrheae* culture--$45.

(xvi) Pure culture identification:

(I) aerobes--$45;

(II) anaerobes--$80;

(III) *Campylobacter*--$55; and

(IV) *N. gonorrheae*--$55.

(xvii) *Streptococcus* screen--$20.

(xviii) Tissue:

(I) Lyme disease--$60;

(II) RMSF--$60; and

(III) relapsing fever--$90.

(xix) Toxin studies:

(I) botulinus toxin--$130;

(II) *Clostridium* toxin--$35;

(III) Shiga toxin--$75; and

(IV) Toxic Shock Syndrome Toxin-1 (TSST)--$70.

(xx) Vibrio culture--$70.

(B) Clinical chemistry.

(i) Blood typing:

(I) ABO typing--$7.50;

(II) antibody screen (blood type)--$20;

(III) antigen typing (blood type)--$10;

(IV) antigen titering--$10; and

(V) Rh typing--$10.50.

(ii) Cholesterol:

(I) cholesterol and high density lipoprotein (HDL)-- $7.50; and

(II) cholesterol only--$6.00.

(iii) Glucose:

(I) glucose, postprandial, 0 and 2 hours--$11;

(II) glucose, random, fasting--$5.50;

(III) glucose tolerance test, 1 hour--$11;

(IV) glucose tolerance test, 2 hour--$16.50; and

(V) glucose tolerance test, 3 hour--$22.

(iv) Hemoglobin, total--$4.50.

(v) Hemoglobinopathy--$12.

(vi) Lead screen--$9.00.

(vii) Lipid profile, includes cholesterol; triglycerides; HDL; and low-density lipoprotein (LDL)--$22.

(viii) Phenylalanine--$30.

(ix) Phenylalanine/Tyrosine--$30.

(x) Thyroid profile includes total thyroxine (T4); free T4; and thyroid stimulating hormone (TSH)--$25.

(xi) TSH--$25.

(xii) Tyrosine--$30.

(xiii) Free T4--$15.

(xiv) Total T4--$12.50.

(C) DNA (Deoxyribonucleic acid) analysis:

(i) β -Hemoglobulin panel (5 tests)--$85;

(ii) Congenital adrenal hyperplasia--$430;

(iii) Congenital adrenal hyperplasia, DNA carrier analysis of family member--$165;

(iv) Galactosemia--$405;

(v) Galactosemia, DNA carrier analysis of family member--$165;

(vi) Hemoglobinopathy study, E29n or E28--$45;

(vii) Hemoglobinopathy study, S and C--$50;

(viii) Phenylketonuria--$480; and

(ix) Phenylketonuria, DNA carrier analysis of family member--$165.

(D) Genetics:

(i) alpha fetoprotein (AFP)--$25;

(ii) β-human chorionic gonadotropin (β-HCG)--$12.50;

(iii) unconjugated estriol-3 (UE3)--$17.50; and

(iv) triple screen, includes β-HCG, UE3, and AFP--$50.

(E) Mycobacteriology/mycology.

(i) Acid fast bacillus (AFB):

(I) amplification only--$55;

(II) identification, referred isolates--$25;

(III) primary drug panel--$45;

(IV) probe only--$35;

(V) Pyrazinamide (PZA) only--$15;

(VI) secondary drug panel--$130;

(VII) smear and culture--$45;

(VIII) smear only--$15; and

(IX) smear, culture and fungal culture--$105.

(ii) Direct High Performance Liquid Chromatography (HPLC), only--$25.

(iii) Fungus:

(I) culture--$60;

(II) identification--$55; and

(III) probe only--$35.

(iv) *M. kansasii* susceptibility, rifampin--$10.

(F) Newborn screening test kit, including screening panel--$30. (Fees are based on the newborn screening test kits described in §73.21 of this title (relating to Newborn Screening), which includes the costs of the screening panel.)

(G) Parasitology.

(i) Blood/tissue parasites--$125.

(ii) *Giardia/Cryptosporidium* antigen screen--$75.

(iii) Intestinal parasites--$95.

(iv) Parasite culture--$135.

(v) Pinworm swab--$35.

(vi) Worm identification--$25.

(H) Serology.

(i) Arbovirus:

(I) immunoglobulin G (IgG)--$50;

(II) immunoglobulin M (IgM)--$70; and

(III) panel--$120.

(ii) *Aspergillus*--$25.

(iii) *Brucella*--$12.50.

(iv) Cat scratch fever (*Bartonella*)--$40.

(v) Cytomegalovirus (CMV):

(I) IgG--$30;

(II) IgM--$35; and

(III) panel--$35.

(vi) *Erlichia*--$40.

(vii) FTA (fluorescent triponemal antibody) only--

(viii) Fungus:

(I) identification--$55; and

(II) panel--$70.

(ix) Hantavirus, IgG/IgM--$75.

(x) Hepatitis A:

(I) IgM--$45; and

(II) total--$10.

(xi) Hepatitis B:

(I) core antibody--$30;

(II) surface antibody (Ab)--$15; and

(III) surface antigen (Ag)--$10.

(xii) Hepatitis B e Ab--$20.

(xiii) Hepatitis B e Ag--$15.

(xiv) Hepatitis C (HCV)--$12.

(xv) Hepatitis C (RIBA)--$140.

(xvi) Human immunodeficiency virus (HIV):

(I) confirmation--$35;

(II) screen--$10; and

(III) viral load--$140.

(xvii) HIV/HCV panel--$22.

(xviii) Influenza A and B--$40.

(xix) *Legionella*--$55.

(xx) Lyme (*Borrelia*) IgG/IgM panel--$30.

(xxi) Miscellaneous serological tests--$30.

(xxii) Mumps:

(I) IgG--$30; and

(II) IgM--$30.

(xxiii) Parvovirus B-19, IgG/IgM--$60.

(xxiv) Plague (*Yersinia*)--$15.

(xxv) Poliomyelitis (polio) I, II, III--$70.

(xxvi) Q-fever--$50.

(xxvii) *Rickettsia* Panel--$55.

(xxviii) *Rickettsia/Ehrlichia* Panel--$95.

(xxix) RPR (rapid plasma reagent test)--$5.00.

(xxx) RPR/syphilis confirmation--$12.50.

(xxxi) Rubella:

(I) IgG--$15;

(II) IgM--$30; and

(III) screen--$7.50.

(xxxii) Rubeola:

(I) IgG--$30; and

(II) IgM--$35.

(xxxiii) Toxoplasmosis:

(I) IgG--$40; and

(II) IgM--$40.

(xxxiv) Tularemia (*Francisela*)--$45.

(xxxv) *Varicella zoster*--$45.

(xxxvi) VDRL (venereal disease research laboratory) test--$25.

(xxxvii) West Nile virus (WNV)--$15.

(I) Virology.

(i) *Chlamydia* culture--$80.

(ii) *Dengue* isolation--$80.

(iii) Electron microscope studies only--$285.

(iv) Herpes simplex isolation--$85.

(v) Influenza:

(I) surveillance--$125; and

(II) subtyping--$105.

(vi) Virus:

(I) detection by PCR--$250;

(II) virus identification on submitted isolate (reference specimen)--$205; and

(III) virus isolation, comprehensive--$210.

(2) Non-human specimens.

(A) Bacteriology.

(i) Environmental:

(I) Swabs--$25;

(II) *Legionella*--$70;

(III) bioterriorism--$200; and

(IV) bioterriorism smear--$15.

(ii) Food.

(I) Bioterriorism--$200.

(II) Botulism (*C. botulinum*)--$120.

(III) Pathogen panel:

(-a-) basic--$115; and

(-b-) complex--$280.

(IV) Single organism--$45.

(V) Standard plate count--$25.

(VI) Toxin--$45.

(iii) Milk and dairy products.

(I) Dairy, cultured--$35.

(II) Ice cream--$70.

(III) Milk:

(-a-) pasteurized milk panel--$95;

(-b-) raw milk panel--$120; and

(-c-) single test--$70.

(iv) Seafood:

(I) brevitoxin--$200;

(II) fecal coliform--$40;

(III) standard plate count--$35; and

(IV) *Vibrios*--$60.

(v) Water.

(I) Bay waters--$30.

(II) Coliform:

(-a-) fecal--$30; and

(-b-) coliform, total--$40.

(III) Potable water--$25.

(IV) Reagent water suitability--$90.

(B) Entomology.

(i) Insect examination, Chaga's disease--$25.

(ii) Insect identification--$20.

(iii) Mosquito identification:

(I) adult, per carton--$50;

(II) egg paddle, per paddle--$5.00; and

(III) larvae, per vial--$45.

(iv) Tick examination:

(I) Lyme disease, *Borrelia* and Rock Mountain spotted fever (RMSF)--$35;

(II) relapsing fever--$35; and

(III) Tick identification, per vial--$25.

(C) Parasitology. Water filter examination--$175.

(D) Serology.

(i) Arbovirus, equine, includes western equine encephalitis (WEE); eastern equine encephalitis (EEE); and WNV--$50.

(ii) Hantavirus, animal--$75.

(iii) Plague (*Yersinia*), animal--$15.

(E) Virology.

(i) Arbovirus isolation:

(I) avian--$35; and

(II) mosquito--$60.

(ii) Arbovirus PCR:

(I) avian--$250; and

(II) mosquito--$250.

(iii) Avian serology:

(I) arbovirus--$55; and

(II) arbovirus (chicken)--$30.

(iv) Rabies testing--$65.

(v) Rabies virus typing:

(I) molecular--$125; and

(II) monoclonal--$35.

(F) Handling fees.

(i) Pathogenic agents--$60;

(ii) Clinical specimens and environmental samples--$30.

§73.55. Fee Schedule for Chemical Testing of Environmental Samples.

Fees for chemical testing of environmental samples shall not exceed the following amounts.

(1) The following fees apply to the analysis of organic compounds in air:

(A) formaldehyde, National Institute Of Occupational Safety and Health (NIOSH) methods--$130;

(B) pesticides, NIOSH Method--$160; and

(C) VOCs, NIOSH Method--$149.

(2) The following fees apply to the analysis of drinking (including bottled) water samples.

(A) Inorganic parameters.

(i) Individual tests:

(I) alkalinity, total and phenolphthalein, Standard Methods (SM), 18th edition, 2320B--$23;

(II) bicarbonate-carbonate, with alkalinity, SM, 18th edition, 2320B--$15;

(III) bicarbonate-carbonate, without alkalinity, SM, 18th edition, 2320B--$23;

(IV) boron, SM, 18th edition, 4500B-B--$53;

(V) bromate, Environmental Protection Agency (EPA) method 300.1--$110;

(VI) bromide, EPA method 300.0--$25;

(VII) carbon, total organic, SM, 18th edition, 5310C-- $43;

(VIII) chlorate, EPA method 300.0--$55;

(IX) chloride, EPA method 300.0--$19;

(X) chlorine, SM, 19th edition, 4500-Cl F--$20;

(XI) chlorine dioxide, SM, 19th edition, 4500-ClO2 B - $80;

(XII) chlorite, EPA method 300.0--$55;

(XIII) chloramines, SM, 19th edition, 4500-ClO2 D--$20;

(XIV) color, SM, 18th edition, Ed. 2120B--$24;

(XV) conductance, SM, 18th edition, 2510B--$19;

(XVI) cyanide, total, EPA method 4500 CN-B+C+E--$55;

(XVII) fluoride, EPA method 300.0--$19;

(XVIII) hardness, EPA method 130.1--$43;

(XIX) nitrate and nitrite as nitrogen, EPA method 353.2--$22;

(XX) nitrate as nitrogen, EPA method 353.2--$22;

(XXI) nitrite as nitrogen, EPA method 353.2--$22;

(XXII) odor, SM, 18th edition, 2150B--$50;

(XXIII) perchlorate, EPA method 314.0--$55;

(XXIV) perchlorate, Unregulated Contamination Monitoring Regulation (UCMR), EPA 314.0--$61;

(XXV) pH, EPA method 150.1--$19;

(XXVI) phenolics, total recoverable, EPA 4020.1--$48;

(XXVII) residue, total, SM, 18th edition, 2540B--$22;

(XXVIII) silica, dissolved, SM, 18th edition, 4500Si--$24;

(XXIX) solids, suspended, volatile or fixed, SM, 18th edition, 2540G--$31;

(XXX) solids, total dissolved, calculated, SM, 18th edition, 1030F--$14;

(XXXI) solids, total dissolved, determined, SM, 18th edition, 2540C--$31;

(XXXII) solids, total suspended, SM, 18th edition, 2540D--$31;

(XXXIII) sulfate, EPA method 300.0--$19; and

(XXXIV) turbidity, EPA method 180.1--$20.

(ii) Routine water mineral group, EPA methods 150.1, 300.0, and 353.2, and SM, 18th edition, 2320B, 2510B, and 1030F--$147.

(B) Metals analysis. A preparation fee applies to all drinking water samples analyzed by inductively coupled plasma (ICP) or by inductively coupled plasma-mass spectrometry (ICP-MS) with turbidity greater than or equal to 1 Nephelometric Turbidity Unit (NTU). The total analysis cost includes the sample preparation fee and the per-element or per-group fee.

(i) Sample preparation fee--total recoverable metals digestion, EPA method 200.2--$29.

(ii) Per-element analysis fees:

(I) mercury, EPA method 245.1--$25;

(II) single ICP, EPA method 200.7--$19; and

(III) single ICP-MS, EPA method 200.8--$25.

(iii) Group fees:

(I) all metals drinking water group, EPA methods, 200.7, 200.8, and 245.1--$264;

(II) ICP/ICP-MS metals drinking water group, EPA methods 200.7 and 200.8 --$165; and

(III) lead/copper, EPA method 200.8--$24.

(C) Organic compounds:

(i) chlorinated pesticides and PCBs in drinking water, EPA method 508--$206;

(ii) chlorophenoxy herbicides, EPA method 515.1--$220;

(iii) chlorophenoxy herbicides, UCMR, EPA method 515.1--$242;

(iv) diquat and paraquat EPA method 549--$242;

(v) ethylene dibromide (EDB) and dibromochloropropane (DBCP), EPA method 504.1--$156;

(vi) endothall, EPA method 548--$357;

(vii) glyphosate, EPA method 547--$169;

(viii) haloacetic acids and dalapon, EPA method 552.2--$220;

(ix) chlorinated disinfection-by-products (haloacetonitriles) EPA method 551.1--$188;

(x) n-methylcarbomayloximes and n-methylcarbamates (carbamate) pesticides, EPA method 531.1--$200;

(xi) organochlorine pesticides, EPA methods 505 and 508--$184;

(xii) polynuclear aromatic hydrocarbons (PHA) and phthalates, EPA method 525.2--$288;

(xiii) PHA and phthalates, UCMR, EPA method 525.2--$317;

(xiv) PCB screening by Perchlorination, EPA method 508A--$293;

(xv) semi-volatile organic compounds, EPA method 525.2-- $288;

(xvi) trihalomethanes, EPA method 502.2--$67;

(xvii) trihalomethanes, EPA method 524.2--$67;

(xviii) VOCs, EPA method 524.2--$146; and

(xix) VOCs, UCMR, EPA method 524.2--$178.

(D) Radiochemicals:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion--$132;

(ii) carbon-14, Liquid Scintillation--$98;

(iii) gross alpha and beta, EPA method 900.0--$90;

(iv) gross alpha or beta, EPA method 900.0--$80;

(v) gamma emitting isotopes, EPA method 901.1--$75;

(vi) plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry--$72;

(vii) radium-226, EPA method 903.1--$66;

(viii) radium-228, EPA method 904.0--$94;

(ix) radon, EPA method 903.1--$66;

(x) strontium-89 or 90, EPA method 905.1--$101;

(xi) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry--$70;

(xii) total alpha emitting radium, EPA method 903.0--$70; .

(xiii) tritium, EPA method 906.0--$51;

(xiv) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry--$76; and

(xv) Composite/storage fee--$15.

(3) Food and food products:

(A) added substances, United States Department of Agriculture (USDA) calculation--$13;

(B) added water, USDA calculation--$13;

(C) benzoate, Association of Analytical Communities (AOAC) method 960.38--$81;

(D) cereal, UDSA CRL method--$64;

(E) deterioration, canned products, AOAC chart--$24;

(F) fat, dairy products, AOAC method 46.616--$35;

(G) fat, paly screen, AOAC method 46.616--$35;

(H) fat, soxhlet extraction, USDA Fat method--$81;

(I) filth, AOAC methods--$35;

(J) filth, beverages, AOAC method 965.38--$35;

(K) filth, cereal foods, AOAC method 971.32--$35;

(L) filth, nuts and grains, AOAC method 941.16--$35;

(M) filth, pasta, AOAC methods--$35;

(N) filth, spices, AOAC method 945.83--$35;

(O) food coloring, AOAC method 988.13--$58;

(P) insect identification, Food and Drug Administration (FDA) Technical Bulletin #2--$35;

(Q) lead in food by flame atomic absorption spectrometry (FLAAS)--$36;

(R) maximum internal temperature, USDA ICT 2 method--$81;

(S) meat protein, USDA calculation--$15;

(T) moisture (total water), USDA M01 method--$17;

(U) moisture-protein ratio, USDA calculation--$90;

(V) package exam for rodent contamination, AOAC method 973.63--$24;

(W) pH of food products, AOAC method 981.12--$20;

(X) protein, total, USDA protein block digestion--$58;

(Y) rodent pellet, identification, FDA Microscope Analytical Methods in Food and Drug Control--$35;

(Z) salt, USDA Salt method--$105;

(AA) soy protein concentrate, USDA SOY 1 method--$64;

(BB) soya, USDA SOY 1 method--$64;

(CC) sulfite, AOAC method 980.17--$66;

(DD) water activity, SM, 18th edition, 5910--$35; and

(EE) tetracycline in milk, FDA/AOAC methods--$100.

(4) Soil and solids:

(A) pH, Soil, EPA method 9045B--$22.

(B) Metals analysis. A sample preparation fee applies to the analysis of all solid (soil, sediment, etc.) samples. The total cost of the analysis will be the sample preparation fee plus the per-element or per-group analytical fee:

(i) sample preparation fee - acid digestion of sediments, sludges, and soils, EPA SW-846 Method 3050B--$36.

(ii) per-element fee:

(I) lead in paint by FLAAS--$35;

(II) lead in pottery leachate by FLAAS--$26;

(III) lead and cadmium in pottery leachate by FLASS--$47;

(IV) lead in soil by FLAAS--$37;

(V) lead in solids by FLAAS--$35;

(VI) mercury, sediment, EPA method 245.5 and EPA SW-846 method 7471A--$32;

(VII) non-routine single metal, EPA 200 series methods and EPA SW-846 methods: 6010B, 6020, and 7000's--$48;

(VIII) silver, EPA method 200.7, and EPA SW-846 methods 6010B, 7760A, and 7761--$48;

(IX) single metal, FAAS or ICP, EPA 200 series methods, 200.7, and EPA SW-846 6010B and 7000 series methods--$21;

(X) single metal, graphite furnace atomic absorption spectrometry (GFAA) or gas hydride atomic absorption spectrometry (GHAA), EPA 200 series methods and EPA SW-846 methods 7000 series, 7062, and 7742, and SM ,18th edition, 3114--$30; and

(XI) single metal, ICP-MS, EPA method 200.8 and EPA SW-846 method 6020--$25.

(C) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion--$123;

(ii) gross alpha and beta, EPA method 900.0--$81;

(iii) gross alpha or beta, EPA method 900.0--$65;

(iv) gamma emitting isotopes, EPA method 901.1--$112;

(v) plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry-- $72;

(vi) radium-226, DOE-RESL A-20/EPA method 903.1--$109;

(vii) radium-228, DOE-RESL A-20/EPA method 904.0--$88;

(viii) strontium-89 or 90, EPA method 200.3--$118;

(ix) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry-- $70;

(x) tritium, EPA method-Azeotopic Distillation--$79; and

(xi) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry-- $68.

(5) The following fees apply to the analysis of tissue and vegetation samples. A tissue preparation (homogenization) fee applies to all seafood tissue samples analyzed for organic compounds and/or metals. The total analysis cost includes the tissue preparation fee, any analyte specific sample preparation fee, and the per-element or per-group test fee.

(A) Tissue preparation fees:

(i) fillets, EPA method 200.3--$37; and

(ii) whole fish and crabs, EPA method 200.3--$64.

(B) Metals analyses. A sample preparation fee applies to all tissue samples analyzed by ICP or ICP-MS. The total analysis cost includes the sample preparation fee and the per-element or per-group fee:

(i) sample preparation fee- total recoverable metals digestion, EPA method 200.3--$37.

(ii) per-element fees:

(I) mercury, EPA method 245.6--$32;

(II) single metal, FAAS or ICP, EPA 200 series methods, 200.7, or EPA SW-846 methods 6010B, or 7000's--$19;

(III) single metal, GFAA or GHAA, EPA 200 series, methods and EPA SW-846 methods 7000 series, 7062, and 7742, and SM, 18th edition, 3114--$30;

(IV) single metal, ICP-MS, EPA method 200.8, EPA SW-846 method 6020--$25; and

(iii) fish tissue metal group fee--$189.

(C) Organic analyses (the organic analysis fees include any required sample cleanup procedures):

(i) organochlorine pesticides and PCB's, fish fillets, PAM 304 E1 and EPA SW-846 methods 8081A--$812;

(ii) organochlorine pesticides and PCB's, whole fish, PAM 304 E1 and EPA SW-846 methods 8081A--$965;

(iii) semi-volatile organic compounds by gas chromatography/mass spectrometry (GC/MS), fish, JAOAC method and EPA SW-846 methods 3540C and 8270C--$518;

(iv) VOCs, GC/MS, fish, JAOAC method 64;653:ff and EPA SW-846 method 8260B--$249; and

(v) organochlorine pesticides in vegetables by Gas Chromatography (GC)--$604.

(D) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion--$123;

(ii) gamma emitting isotopes, EPA method 901.1--$110;

(iii) gross alpha and beta, EPA method 900.0--$89;

(iv) gross alpha or beta, EPA method 900.0--$65;

(v) plutonium isotopes, DOE-RESL A-20 Alpha Spectrometry-- $72;

(vi) radium-226, DOE-RESL A-20/EPA method 903.1--$109;

(vii) radium-228, DOE-RESL A-20/EPA method 904.0--$78;

(viii) strontium-89 or 90, EPA method 905.1--$119;

(ix) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry-- $70;

(x) tritium, EPA Method 906.0 Azeotopic Distillation--$79; and

(xi) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry-- $68.

(6) Water and wastewater.

(A) Inorganic parameters:

(i) odor, SM, 18th edition, 2150B--$50;

(ii) phenolics, total recoverable, EPA method 4020.1--$48; and

(iii) UV 254, SM 19th edition, 5910--$55.

(B) Metals analysis. The following sample preparation fees apply to the analysis of water and/or wastewater samples. The total cost of the analysis will be the required sample preparation fee plus the per-element or per-group analytical fee:

(i) sample preparation fees:

(I) total recoverable metals digestion, EPA method 200.2 and EPA SW-846 methods 3005A, 3010A, and 3020A--$30; and

(II) filtration (dissolved metals), EPA SW-846 method 3005A--$21.

(ii) per-element fees:

(I) mercury, EPA method 245.1 and EPA SW-846 method 7470A--$32;

(II) silver (includes separate digestion), EPA method 200.7 and EPA SW-846 methods 6010B, 7760A, and 7761--$43;

(III) single metal, FAAS or ICP, EPA method 200.8, 200.7 and EPA SW-846 methods 6010B, and 7000 series--$19;

(IV) single metal, GFAA or GHAA, EPA method 200 series and EPA SW-846 methods 7000series, 7062, and 7742, and SM, 18th edition, 3114--$30; and

(V) single metal, ICP-MS, EPA method 200.8, and EPA SW-846 method 6020--$25.

(C) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion--$132;

(ii) carbon-14, Liquid Scintillation--$98;

(iii) gross alpha and beta, EPA method 900.0--$90;

(iv) gross alpha or beta, EPA method 900.0--$80;

(v) gamma emitting isotopes, EPA method 901.1--$75;

(vi) plutonium, isotopes, DOE-RESL A-20 Alpha Spectrometry--$72;

(vii) radium-226, EPA method 903.1--$81;

(viii) radium-228, EPA method 904.0--$68;

(ix) radon, EPA method 903.1--$66;

(x) strontium-89 or 90, EPA method 905.1--$101;

(xi) thorium isotopes, DOE-RESL A-20 Alpha Spectrometry--$70;

(xii) total alpha emitting radium, EPA method 903.0--$70;

(xiii) tritium, EPA method 906.0--$51; and

(xiv) uranium isotopes, DOE-RESL A-20 Alpha Spectrometry--$76.

(7) Wipe/filter/cartridge.

(A) Lead analysis, FLAAS--$32.

(B) Radiochemistry:

(i) alpha spectrometry preparation, DOE-RESL A-20 Pyrosulfate Fusion--$123;

(ii) carbon-14, Liquid Scintillation--$116;

(iii) gross alpha and beta, EPA method 900.0--$52;

(iv) gross alpha or beta, EPA method 900.0--$40;

(v) gamma emitting isotopes, EPA method 901.1--$64;

(vi) plutonium isotopes, DOE-RESL A-20 Alpha Spectroscopy--$72;

(vii) radium-226, DOE-RESL A-20/EPA method 903.1--$109;

(viii) radium-228, DOE-RESL A-20/EPA method 904.0--$78;

(ix) strontium-89 or 90 EPA method 905.1--$118;

(x) thorium isotopes, DOE-RESL A-20 Alpha Spectroscopy--$70;

(xi) tritium, Azeotopic Distillation--$51; and

(xii) uranium isotopes, DOE-RESL A-20 Alpha Spectroscopy-- $68.

(8) Other chemical testing:

(A) blood identification, Source Book Forensic Serology--$25;

(B) dust identification--$46;

(C) identification of feces stains, AOAC method 981.22--$127;

(D) urine stain identification, AOAC methods 945.88, 942.24, 959.14--$35.

This 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 July 26, 2002.

200204687
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 97. COMMUNICABLE DISEASES

SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

25 TAC §§97.3, 97.4

The Texas Department of Health (department) proposes amendments to §§97.3-97.4, concerning the addition of invasive *Streptococcus pneumoniae* disease to the list of reportable disease conditions in Texas.

This is a proposed amendment to §97.3 concerning the addition of invasive infections of *Streptococcus pneumoniae* to the list of reportable conditions in Texas. The Council for State and Territorial Epidemiologists (CSTE) has recommended national surveillance for invasive pneumococcal disease. In October 2000, the Advisory Committee on Immunization Practices (ACIP) and the American Academy of Pediatrics (AAP) recommended the use of PVC7 (7-valent, pneumococcal polysaccharide-protein conjugate vaccine) for all children two months through 23 months of age and for children 24 months through 59 months of age who are at increased risk for pneumococcal disease. Surveillance of invasive pneumococcal disease will allow for assessment of the impact of recently licensed conjugate pneumococcal vaccine in children.

The proposed amendment to §97.4(a)(5) changes the references to reflect that for all other notifiable diseases not listed in §97.4 (a)(1)-(3), a report of disease shall be made no later than one week after a case is identified.

Linda S. Linville, M.S., R.N., Chief, Bureau Immunization and Pharmacy Support, has determined that for each year of the first five-year-period that the sections will be in effect there will be no fiscal implications for state or local governments as a result of enforcing and administering the sections as proposed. The proposed rule changes are expected to increase the number of disease reports the department's lab makes to the Surveillance and Epidemiology Program of the Immunizations Division. An increase in the surveillance responsibilities of the Surveillance and Epidemiology Program staff required to perform necessary follow-up is expected. However, current local, regional and central office staff will be able to add the required reports to their current responsibilities.

Ms. Linville has also determined that for the first five years the sections are in effect the public benefit anticipated from reporting invasive infections of Streptococcus pneumoniae will be to raise awareness of the recommendation to vaccinate infants with pneumococcal polysaccharide-conjugate vaccine (PVC7) and assess the impact of vaccination on the incidence of invasive infections in children. In addition, reporting of this disease will produce data that will enable assessment of disease among children, older adults, and other high-risk populations; identify areas or populations with sub-optimal use of vaccine; and monitor serotypes responsible for invasive disease in vaccinated children. Ms. Linville has also determined that for each year of the first five years the sections are in effect the impact on hospitals, Texas laboratories, infectious disease physicians and pathologists will be minimal. These entities are already required to report certain diseases to the department and the addition of invasive pneumococcal disease is not expected to substantially increase their reporting requirements. Since additional reporting will be handled by existing staff, there will be no additional fiscal impact to micro-businesses or small businesses. Infection control physicians required to report cases of invasive pneumococcal disease should be able to comply without any increased costs. No impact on local employment is expected.

Comments on the proposal may be submitted to Janie Garcia, Immunization Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7284, extension 6430, or (800) 252-9152. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The amendments are proposed under the authority of Health and Safety Code, §81.041, which gives the board the right to identify each communicable disease or health condition that shall be reported; and Health and Safety Code, §12.001 which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department and the commissioner of health.

The amendments affect the Health and Safety Code, Chapters 12 and 81.

§97.3. What Condition To Report and What Isolates To Report or Submit.

(a) Humans.

(1) (No change.)

(2) Notifiable conditions or isolates.

(A) Confirmed and suspected human cases of the following diseases/infections are reportable: acquired immune deficiency syndrome (AIDS); amebiasis; anthrax; botulism-adult and infant; brucellosis; campylobacteriosis; chancroid; chickenpox (varicella); *Chlamydia trachomatis* infection; Creutzfeldt-Jakob disease (CJD); cryptosporidiosis; cyclosporiasis; dengue; diphtheria; ehrlichiosis; encephalitis (specify etiology); *Escherichia coli*, enterohemorrhagic infection; gonorrhea; Hansen's disease (leprosy); *Haemophilus influenzae* type b infection, invasive; hantavirus infection; hemolytic uremic syndrome (HUS); hepatitis A, B, D, E, and unspecified (acute); hepatitis C (newly diagnosed infection, effective 1/1/00); hepatitis B, (chronic) identified prenatally or at delivery as described in §97.135 of this title (relating to Serologic Testing during Pregnancy and Delivery; human immunodeficiency virus (HIV) infection; legionellosis; listeriosis; Lyme disease; malaria; measles (rubeola); meningitis (specify type); meningococcal infection, invasive; mumps; pertussis; plague; poliomyelitis, acute paralytic; Q fever; rabies; relapsing fever; rubella (including congenital); salmonellosis, including typhoid fever; shigellosis; smallpox; spotted fever group rickettsioses (such as Rocky Mountain spotted fever); streptococcal disease, invasive [~~{~~]group A, [~~or~~] invasive group B, and invasive *Streptococcus pneumoniae*[~~}~~]; syphilis; tetanus; trichinosis; tuberculosis; tularemia; typhus; *Vibrio* infection, including cholera (specify species); viral hemorrhagic fevers; yellow fever; and yersiniosis.

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

(3) Minimal reportable information requirements. The minimal information that shall be reported for each disease is as follows:

(A)-(C) (No change.)

(D) for all other notifiable conditions listed in paragraph (2)(A) [~~subsection (b)(1)~~] of this subsection [~~section~~] - name, present address, present telephone number, age, date of birth, sex, race and ethnicity, physician, disease, type of diagnosis, date of onset, address, and telephone number;

(E)-(F) (No change.)

(4) (No change.)

(b) (No change.)

§97.4. When To Report a Condition or Isolate; Where To Submit an Isolate; Where to Report a Condition or Isolate.

(a) Humans.

(1)-(4) (No change.)

(5) For all other notifiable conditions not listed in paragraphs (1) - (3) [~~subsections (a) - (c)~~] of this subsection [~~section~~], reports of disease shall be made no later than one week after a case or suspected case is identified.

(6)-(7) (No change.)

(b) (No change.)

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

Filed with the Office of the Secretary of State on July 26, 2002.

200204649
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 157. EMERGENCY MEDICAL CARE

SUBCHAPTER C. EMERGENCY MEDICAL SERVICES TRAINING AND COURSE APPROVAL

The Texas Department of Health (department) proposes the repeal of §157.40 and new §157.40 concerning the licensure of paramedics for emergency medical services (EMS) personnel.

Specifically, the new rule section addresses requirements for licensure of paramedics. In accordance with Health and Safety Code, Chapter 773, 76th Legislature, 1999, the department is required to adopt rules concerning minimum requirements for paramedic licensure of EMS personnel. The benefit anticipated for the EMS community is the availability and diversity of the choices of certification and licensure, without compromising standards set to ensure the safety of the public.

Kathryn C. Perkins, Bureau Chief, has determined that for the first five years the proposed repeal and new rule is in effect there will be no fiscal impact on state or local governments.

Kathryn C. Perkins has also determined that for each of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be increased standards for the licensure of paramedic EMS personnel. There will be no adverse economic effect on small businesses or micro-businesses. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the rules as proposed. There are no anticipated costs to persons who are required to comply with the sections proposed. There will be no adverse impact on local employment.

Comments on the proposal may be submitted to Kathryn C. Perkins, Chief, Bureau of Emergency Management, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756-3182, (512) 834-6700. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

25 TAC §157.40

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

The repeal is proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning the licensure of paramedics of emergency medical services (EMS) personnel; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The repeal affects the Health and Safety Code, Chapter 773.

§157.40. Paramedic Licensure.

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

Filed with the Office of the Secretary of State on July 26, 2002.

200204656
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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25 TAC §157.40

The new rule is proposed under the Texas Health and Safety Code, Chapter 773, which provides the department with the authority to adopt rules concerning the licensure of paramedics of emergency medical services (EMS) personnel; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty imposed by law on the board, the department, or the commissioner of health.

The new section affects the Health and Safety Code, Chapter 773.

§157.40. Paramedic Licensure.

(a) Requirements for paramedic licensure.

(1) A currently certified paramedic may apply for a paramedic license if the candidate has at least one of the following degrees from an institution of post secondary education which has been accredited by an agency recognized by the U.S. Department of Education as an approved accrediting authority:

(A) an associate degree in emergency medical services (EMS);

(B) a baccalaureate degree; or

(C) a postgraduate degree.

(2) Initial paramedic license. A candidate for initial paramedic licensure under this section shall:

(A) be at least 18 years of age;

(B) submit an application and a nonrefundable fee, if applicable, of $100;

(C) have completed a Texas Department of Health (department) approved paramedic course.

(D) have met the appropriate requirements in paragraph (1) of this subsection;

(E) submit an official transcript from an accredited institution of post secondary education showing successful completion of at least one of the acedemic degrees referenced in paragraph (1) of this subsection;

(F) submit evidence of a currently valid National Registry Paramedic certification; and

(G) complete all requirements within one year of the application submission date.

(3) Verification of information. After verification by the department of the information submitted by the candidate, a candidate who meets the requirements will be licensed for a period of four years from the effective date.

(4) The license is not transferable.

(5) Duplicate copies of the license and wallet-size copy may be issued, by the department to replace lost credentials for a fee of $5.00.

(6) A licensed paramedic may not hold another department EMS certification except for that of EMS coordinator or EMS instructor.

(b) Renewal of license.

(1) Prior to the expiration of a license, the department may send a notice of expiration by United States mail or electronic mail to the licensee at the address shown in current records of the Bureau of Emergency Management (bureau). It is the responsibility of the licensed paramedic to notify the bureau of any change of address.

(2) If a licensed paramedic has not received notice of expiration from the department at least 30 days prior to the expiration of the license, it is the duty of the license holder to notify the department and request an application for renewal of the license. Failure to apply timely for renewal of the license shall result in expiration of the license.

(3) To maintain licensure status without a lapse, an application for renewal of a license shall be submitted and all requirements for renewal of the license shall be completed prior to the expiration date of the current license, but no earlier than one year prior to the expiration date. When submitting an application, applicants should consider the department's processing time as described in §157.3 of this title (relating to Processing of EMS Provider Licenses and Applications for EMS Personnel Certification and Licensure).

(4) After verification by the department of the information submitted, the license will be renewed for four years beginning on the day following the expiration date of the license. A new wallet-size card signed by department officials will be issued.

(5) Licensure fee.

(A) The licensee shall submit a non-refundable fee of $100 with the application;

(B) EMS volunteer - no fee. However, if the applicant later receives compensation during the renewed licensure period, the exemption ceases and the individual shall pay a prorated fee to the department based on the number of years remaining in the licensure period when employment begins. The non-refundable fee shall be $25 per each year remaining in the licensure. Any portion of a year that the licensed paramedic receives compensation for his paramedic service will count as a full year.

(6) A license is not transferable.

(7) Military personnel. A licensed paramedic who is deployed in support of military, security, or other action by the United Nations Security Council, a national emergency declared by the president of the United States, or a declaration of war by the United States Congress is eligible for relicensure under timely relicensure requirements from the person's date of demobilization until one calendar year after the date of demobilization but will not be licensed during that period.

(c) Relicensure Options.

(1) Upon submission of a completed application for relicensure, the applicant shall relicense in accordance with the provisions in §157.34(b)(1)-(5) of this title (relating to Recertification).

(2) Relicensure by continuing education. A licensee selecting Option 2, as defined in §157.34(b)(2) of this title, and in accordance with §157.38 of this title (relating to Continuing Education) may substitute up to 12 contact hours in the Preparatory content area and up to 48 contact hours of continuing education in the Additional Approved Categories area with any course of non-clinical professional development study approved by the licensee's medical director.

(d) Late relicensure.

(1) Following the expiration date of the paramedic license, a candidate shall be considered as non-licensed and may not function in the capacity of an EMS licensee or certificant or represent that he is licensed or certified until relicensure is issued.

(2) A candidate whose license has been expired for 90 days or less may renew the license by meeting the requirements of subsection (c) of this section, submitting an application and paying to the department a nonrefundable renewal fee that is equal to 1 1/2 times the normally required application renewal fee as listed in subsection (b)(2) of this section.

(3) A candidate whose license has been expired for more than 90 days but less than one year may renew the license by:

(A) submitting an application and paying to the department a nonrefundable renewal fee that is equal to two times the normally required application renewal fee as listed in subsection (b)(5) of this section;

(B) submitting documentation that verifies completion of a formal recertification course; or

(C) achieving a passing score on the National Registry Paramedic Assessment written exam.

(4) A candidate whose certificate has been expired for one year or more may not renew the license. The candidate may become licensed by complying with the requirements of subsection (a) of this section.

(e) Voluntary downgrades. An individual who holds paramedic licensure may be certified at a lower level voluntarily for the remainder of the current license by submitting an application for certification and the applicable nonrefundable fee as required in §157.33(a)(4) of this title (relating to Certification).

(f) Inactive status. A licensed paramedic may make application to the department for inactive status at any time during the licensure period or after the license expiration date, if the license can be verified by the department.

(1) The initial inactive status period shall remain in effect until the end of the current license period for those candidates who are currently licensed and shall be renewable every four years thereafter.

(2) For those achieving inactive status after expiration of the active license, the initial inactive status period shall remain in effect for four years from the date of issuance. The candidate shall submit an application and the full fee as stated in subsection (b)(2) of this section.

(3) While on inactive status a person shall not provide patient care as that of certified or licensed personnel and may only act as a bystander. Failure to comply shall be cause for revocation of the inactive status license and may result in denial of future applications for licensure.

(4) An individual shall not simultaneously hold inactive and active EMS personnel certification and/or licensure.

(5) The initial inactive status period shall remain in effect until the end of the current licensure period for those candidates who are currently licensed and may be renewable every four years thereafter by submitting an application and the appropriate nonrefundable fee as in subsection (b)(5) of this section.

(g) Reentry. Reentry is the process for regaining active EMS licensure after a period of inactive status. To reenter from inactive status the candidate shall:

(1) complete a department approved formal paramedic recertification course;

(2) submit an application and nonrefundable fee as required in subsection (b)(2) of this section;

(3) pass the National Registry Paramedic Assessment Examination; and

(4) all reentry requirements shall be completed within one year after the application date.

(h) Applying for inactive status after expiration of active or inactive licensure status. A candidate seeking to achieve inactive licensure after expiration of active or inactive licensure status shall apply within the department's record retention requirements for the prior license, which is no later than three years past the license expiration.

(i) Reciprocity. A person currently certified by the National Registry and/or certified or licensed as a paramedic in another state and who meets all the requirements of this section may apply for licensure by submitting an application along with a nonrefundable fee of $100 and meeting the requirements set forth in subsection (a)(1) and (a)(2)(B) of this section. After the department evaluates the application, verifies the licensure and assures that the requirements in subsection (a) of this section have been met, the candidate will be licensed in Texas for four years from the issuance date of the current Texas licensure.

(j) Equivalency.

(1) A candidate for licensure who completed EMS training outside the United States or its possessions, or a candidate who is certified or licensed in another healthcare discipline may apply for licensure by meeting the requirements set forth in subsection (a)(1) of this section and the following additional requirements:

(A) be at least 18 years of age;

(B) submit a copy of the course completion certification from an accredited post secondary institution approved by the department to sponsor an EMS education program;

(C) submit an application and appropriate nonrefundable fee as follows:

(i) a candidate who completed EMS training outside the United States or its possessions - $150;

(ii) a candidate who is certified or licensed in another healthcare discipline - $100; and

(D) achieve National Registry paramedic certification.

(2) Evaluations of curricula conducted by post secondary educational institutions under this subsection shall be consistent with the institution's established policies and procedures for awarding credit by transfer or advanced placement.

(k) Military personnel. A licensee who fails to renew a license within three months of the expiration date because of active duty in the United States military outside the State of Texas shall have one year from the date of discharge or the date of reassignment to Texas (whichever is first) to complete all requirements for relicensure.

(l) Conversion from inactive paramedic certification to inactive paramedic licensure. A certified paramedic currently on inactive status who meets all other criteria as defined in subsection (a)(1) of this section may apply for inactive licensure status.

(1) The inactive certificant shall:

(A) submit an application for inactive licensure to the department along with a nonrefundable fee of $100; and

(B) submit evidence of the issuance of a degree from an accredited college or university as defined in subsection (a)(1) of this section.

(2) After verification by the department of the information submitted, the license will be issued in an inactive status for four years beginning on the day of issuance.

This 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 July 26, 2002.

200204655
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER A. RABIES CONTROL AND ERADICATION

25 TAC §169.22, §169.26

The Texas Department of Health (department) proposes amendments to §169.22 and §169.26 concerning rabies control and eradication. Specifically, the sections cover definitions and facilities for the quarantining of animals. The amendments clarify

the intent of the Texas Legislature to exempt no animal impoundment facilities from the requirement to meet minimum standards as reflected in Texas Health and Safety Code, §826.051.

Jane C. Mahlow, DVM, MS, Director of the Zoonosis Control Division, has determined that for each year of the first five years that the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed. Impoundment facilities in counties with a population under 75,000 may need to invest money and resources in order to meet minimum standards because in the past they were considered exempt under Texas Health and Safety Code, §823.002, Animal Shelters. However, Texas Health and Safety Code, §826.051, Rabies Control Act, does not exempt them, so they are required to meet these standards. There is no anticipated effect on local employment.

Dr. Mahlow has also determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of this will be that all facilities for impounding animals must meet the minimum standards required for sanitation and waste disposal. The proposed changes do not involve adaptation from current practice; therefore, there is no anticipated additional cost to small businesses or micro-businesses nor to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Jane C. Mahlow, DVM, MS, Texas Department of Health, Zoonosis Control Division, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7255, jane.mahlow@tdh.state.tx.us. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Health and Safety Code, Chapter 826, "Rabies," §826.011, which provides the Texas Board of Health (board) with the authority to administer the rabies control program and adopt rules necessary to effectively administer this program; §826.051which requires the department to adopt rules governing the types of facilities that may be used to quarantine or impound animals; and §12.001, which provides the board with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The amendments affect Texas Health and Safety Code, Chapter 826.

§169.22. Definitions.

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

(1) - (14) (No change.)

(15) Impoundment -- The collecting or [~~and~~] confining of an animal because of a state or local ordinance or because of a contract with a county or municipality.

(16) - (31) (No change.)

§169.26. Facilities for the Quarantining or Impounding of Animals.

(a) Generally.

(1) Structural strength. Housing facilities shall be structurally sound and shall be maintained in good repair in order to protect the animals from injury, to contain them, and to prevent transmission of diseases [~~exposure to other animals and the public.~~]

(2) - (12) (No change.)

(b) - (e) (No change.)

(f) This section applies to all animal shelters located in counties with a population of 75,000 or greater as required by Health and Safety Code, Chapter 823 and to all quarantine or impoundment facilities regardless of county population.

This 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 July 25, 2002.

TRD-200204652
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 193. ADMINISTRATIVE SERVICES

25 TAC §193.1, §193.2

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

The Texas Department of Health (department) proposes the repeal of §193.1 and §193.2, concerning federal administrative services.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §193.1 and §193.2 and has determined that the reasons for adopting the sections no longer continue to exist.

The department published a Notice of Intention to Review §193.1 and §193.2 in the *Texas Register* on July 20, 2001 (26 TexReg 5449).

The rules are being repealed because they are obsolete and the repeal has no legal effect on any obligation of the department to comply with federal law. The department is not required by any federal or state law to adopt rules on the documents referenced in these sections.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the repeals are in effect, there will be no fiscal impact on state or local governments.

Ms. Steeg has also determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of enforcing the repeals will be to clarify the department rules by eliminating obsolete provisions. There will be no cost effects on micro businesses or small businesses. This was determined by interpretation of the rules that micro businesses or small businesses will not be required to alter their business practices in order to comply with the repeals as proposed. There are no anticipated economic costs to persons who are required to comply with the repeals as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Sharon Alexander, Texas Department of Health, Office of General Counsel, 1100 West 49th Street, Austin, Texas 78756-3783, (512) 458-

7236 or by e-mail to Sharon.Alexander@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeals are proposed under the Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the Texas Board of Health, the department and the commissioner of health.

The repeals affect the Health and Safety Code, Chapter 12, and implement Government Code, §2001.039.

§193.1. Federal Laws on Administrative Services.

§193.2. Federal Requirements on Administrative Services.

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204610
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 229. FOOD AND DRUG

The Texas Department of Health (department) proposes the repeal of §§229.191 - 229.208 and new §§229.541 - 229.554, §§229.571 - 229.584, §§229.601 - 229.614, and §§229.631 - 229.644 concerning the regulation of food, drug, device and cosmetic salvage establishments and brokers. The repeal and proposed new sections are necessary in order to reflect changes in provisions to the statutory authority enacted as a result of Senate Bill 1080, passed during 77th Texas Legislature (2001), which amended the Health and Safety Code, §§431.008, 431.023, 431.048, 431.059, 432.003, 432.005, 432.011, 432.026, and 483.041.

Government Code, §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). The sections have been reviewed and the department has determined that reasons for adopting the sections continue to exist; however the rules need revisions as described in this preamble.

The department published a Notice of Intention to Review for §229.191 - 229.208 regarding agency review of rules in Government Code §2001.039 in the *Texas Register* on March 15, 2002 (27 TexReg 2084). No comments were received as a result of the publication of the notice.

Susan Tennyson, Chief of the Bureau of Food and Drug Safety, has determined that for each year of the first five years the new sections and repeals are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed. There is no anticipated impact on local employment.

Ms. Tennyson has also determined that for each year of the first five years the new sections and repeals are in effect, the public benefits anticipated as a result of enforcing or administering the sections will be the prevention of serious injury to consumers from the use of adulterated and misbranded food, drugs, devices, and cosmetics. The injury prevention will be achieved through additional clarification and understanding of the salvage requirements provided by this proposal, including revised licensing and enforcement provisions and the reorganization of requirements into separate subchapters based on the type of product salvaged. There will be no effect on micro or small businesses because the new rules are mostly a reorganization of the repealed rules pursuant to the mandate in Senate Bill (SB) 1080 that the standards for salvaged food, drugs, devices, and cosmetics be in separate subchapters. The new requirements are less burdensome to the industry. There are no anticipated economic costs to persons who are required to comply with the new sections and repeals as proposed.

Comments on the proposal may be submitted to Susan Tennyson, Texas Department of Health, Bureau of Food and Drug Safety, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0222, facsimile (512) 719-0202. Comments will be accepted for 30 days following the publication of the proposal in the *Texas Register*.

SUBCHAPTER M. REGULATION OF FOOD, DRUG, DEVICE, AND COSMETIC SALVAGE ESTABLISHMENTS AND BROKERS

25 TAC §§229.191- 229.208

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

The repeals are proposed under Health and Safety Code, §432.011, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 432; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed repeals affect Health and Safety Code, Chapter 432; and Government Code, §2001.039.

§229.191. Purpose.
§229.192. Applicable Federal Laws and Regulations.
§229.193. Definitions.
§229.194. Exemptions.
§229.195. Licensure Requirements.
§229.196. Licensure Procedures.
§229.197. Report of Changes.
§229.198. Licensure Fees.
§229.199. Denial, Suspension, or Revocation of License.
§229.200. Personnel.
§229.201. Construction and Maintenance of Physical Facilities.
§229.202. Sanitary Facilities and Controls.
§229.203. General Provisions for Handling Distressed Merchandise.
§229.204. Handling Distressed Food.
§229.205. Handling Distressed Drugs.
§229.206. Handling Distressed Devices.
§229.207. Records.
§229.208. Enforcement and Penalties.

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204688
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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SUBCHAPTER AA. REGULATION OF FOOD SALVAGE ESTABLISHMENTS AND BROKERS

25 TAC §§229.541- 229.554

The new sections are proposed under Health and Safety Code, §432.011, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 432; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new sections affect Health and Safety Code, Chapter 432; and Government Code, §2001.039.

§229.541. Purpose.

These sections provide for the licensing and regulation of food salvage establishments and brokers to prevent the sale or distribution of adulterated or misbranded food to consumers.

§229.542. Applicable Laws and Regulations.

(a) A salvage establishment or salvage broker who is subject to these sections and who is also involved in the reconditioning, sale, or distribution of distressed or salvaged medical devices, drugs, or cosmetics must comply with the applicable requirements in Subchapter BB of this chapter (relating to Regulation of Drug Salvage Establishments and Brokers), Subchapter CC of this chapter (relating to Regulation of Device Salvage Establishments and Brokers), and Subchapter DD of this chapter (relating to Regulation of Cosmetic Salvage Establishments and Brokers).

(b) The Texas Department of Health (department) adopts by reference the following federal laws and regulations:

(1) Federal Food, Drug, and Cosmetic Act, 21 United States Code (U.S.C.), §301 et seq. as amended;

(2) Fair Packaging and Labeling Act, 15 U.S.C.. §1451 et seq. as amended;

(3) Section 501(c)(3), Internal Revenue Code of 1986, as amended; and

(4) 21 Code of Federal Regulations (CFR), Part 178, Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers, as amended.

(c) Copies of these laws and regulations are indexed and filed in the office of the Bureau of Food and Drug Safety, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours. Electronic copies of these laws and regulations are available from the Manufactured Foods Division website at http://www.tdh.state.tx.us/bfds/foods.

(d) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable federal laws and regulations.

§229.543. Definitions.

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

(1) Act - The Texas Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, Chapter 432.

(2) Adulterated food - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.081.

(3) Authorized Agent - An employee of the department who is designated by the commissioner to enforce the provisions of this chapter.

(4) Board - The Texas Board of Health.

(5) Change of ownership - A sole proprietor who transfers all or part of the salvage establishment or salvage broker business to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a salvage establishment or salvage broker business owned by a partnership; a corporate sale, transfer; reorganization; or merger of the corporation which owns the salvage establishment or salvage broker business if the sale, transfer, reorganization, or merger causes a change in the salvage establishment's or salvage broker business' ownership to another person or persons; or if any other type of association, the removal, addition, or substitution of a person or persons as a principal of such association.

(6) Commissioner - The Commissioner of Health.

(7) Department - The Texas Department of Health.

(8) Device - An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component; part, or accessory; that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(9) Distressed food - Any food that is adulterated or misbranded within the meaning of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §§431.081 and 431.082. The term includes food that:

(A) has lost its labeling or is otherwise unidentified;

(B) has been subjected to prolonged or improper storage, including insanitary conditions whereby the food may have become contaminated with filth or whereby it may be rendered injurious to health;

(C) has been subjected for any reason to abnormal environmental conditions, including temperature extremes, humidity, smoke, water, fumes, pressure, or radiation;

(D) has been rendered unsafe or unsuitable for human consumption or use for any other reason.

(10) Drug -

(A) an article or substance recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, and the official National Formulary, or any supplement of them;

(B) an article or substance designed or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) an article or substance intended for use as a component of any article or substance specified in this definition.

(11) Food -

(A) any article of food or drink for man;

(B) chewing gum; or

(C) an article used for components of any such article.

(12) Food reclamation center - A facility or person that engages in the reconditioning or inventorying, separating, and disposing of distressed food on a fee for service basis. Distressed food may originate from a wholesale distributor, manufacturer, or retail facility, and may be handled within said facility by someone other than the distributor, manufacturer, or retail facility. For the purpose of licensing under these sections, a food reclamation center is a salvage establishment.

(13) Labeling - All labels and other written, printed, or graphic matter:

(A) upon any article or any of its containers or wrappers; or

(B) accompanying such article.

(14) Manufacture - The combining, purifying, processing, packing, or repacking of food for wholesale or retail sale.

(15) Manufacturer - Includes a person who represents himself as responsible for the purity and proper labeling of a food.

(16) Misbranded food - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.082.

(17) Nonprofit organization - An organization which has received an exemption from federal taxation under 26 U.S.C., §501(c)(3).

(18) Nonsalvageable food - Distressed food, as defined in this section, which cannot be safely or practically reconditioned.

(19) Perishable - Capable of spoilage or deterioration due to improper refrigeration or handling.

(20) Person - An individual, corporation, business trust, estate, trust, partnership, association, or any other public or private legal entity.

(21) Personnel - Any person employed by a salvage establishment or salvage broker who does or may in any manner handle or come in contact with the handling, storing, transporting, or selling and distributing of salvageable or salvaged food.

(22) Place of business - Each location from which a salvage establishment or salvage broker operates.

(23) Potentially hazardous food - A food that is natural or synthetic and that requires temperature control because it is in a form capable of supporting the rapid and progressive growth of infectious or toxigenic microorganisms; the growth and toxin production of Clostridium botulinum; or in raw shell eggs, the growth of Salmonella enteritidis.

(24) Reconditioning - Any appropriate process or procedure by which distressed food can be brought into compliance with the standards of the department for consumption or use by the public. In addition, all reconditioned food must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(25) Sale or distribution - The act of selling or distributing, whether for compensation or not, and includes delivery, holding, or offering for sale, transfer, auction, storage, or other means of handling or trafficking.

(26) Salvage broker - A person who engages in the business of selling, distributing, or otherwise trafficking in any distressed or salvaged food, drug, device, or cosmetic and who does not operate a salvage establishment.

(27) Salvage establishment - Any place of business engaged in reconditioning or by other means salvaging distressed food, drugs, devices, or cosmetics or that sells, buys, or distributes for human use any salvaged food, drug, device, or cosmetic. For the purpose of licensing under these sections, a food reclamation center is a salvage establishment.

(28) Salvage operator - A person who is engaged in the business of operating a salvage establishment.

(29) Salvage warehouse - A separate storage facility used by a salvage broker or salvage establishment for the purpose of holding distressed or salvaged food.

(30) Salvageable food - Any distressed food, as defined in this section, which can be reconditioned to departmental standards.

(31) Salvaged food - Any distressed food that has been reconditioned.

(32) Sanitize - Adequate treatment of surfaces by a process that is effective in destroying vegetative cells of microorganisms of public health significance and in substantially reducing numbers of other microorganisms. Such treatments shall not adversely affect the product, shall meet the requirements of 21 CFR, §178.1010 as amended, and shall be safe to the consumer.

(33) Vehicles - Any truck, car, bus, or other means by which distressed, salvageable, or salvaged food is transported from one location to another.

§229.544. Exemptions and Applicability.

(a) A person is exempt from licensing under these sections if the person is:

(1) a manufacturer, distributor, or processor of a food who in the normal course of business engages in the activities of reconditioning the items manufactured, distributed, or processed by or for that person and not purchased by that person solely for the purpose of reconditioning and sale;

(2) a common carrier or the common carrier's agent who disposes of or otherwise transfers undamaged or distressed foods to a person who is exempt under this section or to a licensed salvage broker or salvage operator;

(3) a person who transfers distressed food to a licensed salvage broker or salvage operator; or

(4) a nonprofit organization that distributes food to the needy under the provisions of the Good Faith Donor Act, Civil Practice and Remedies Code, Chapter 76, but does not recondition such food.

(b) An exemption from the licensing requirements under these sections does not constitute an exemption from other applicable provisions of the Texas Food, Drug, and Cosmetic Act, Health and Safety

Code, Chapter 431 or the rules adopted to administer and enforce the Act.

(c) A salvage establishment or salvage broker engaging in conduct within the scope of the license issued under §229.545 of this title (relating to Licensing Requirements and Procedures) is not required to also be licensed under Health and Safety Code, Chapter 431. An exemption from the licensing requirements under Health and Safety Code, Chapter 431, does not constitute an exemption from other applicable provisions of the Health and Safety Code Chapter 431 or the rules adopted to administer and enforce the chapter.

§229.545. Licensing Requirements and Procedures.

(a) General. Except as provided by §§229.544, 229.574, 229.604, and 229.634 of this title (relating to Exemptions and Applicability), it shall be unlawful for any person to operate a salvage establishment or operate as a salvage broker within the State of Texas, who does not possess a current and valid license issued by the department.

(b) Licensing of out-of-state salvage establishments and brokers. A person who operates a salvage establishment or acts as a salvage broker outside this state may not sell, distribute, or otherwise traffic in distressed or salvaged food, drugs, devices, or cosmetics within this state unless the person holds a license from the department.

(c) Reports from other jurisdictions. The department may accept reports from authorities in other jurisdictions to determine the extent of compliance with these sections and with the provisions of the Act.

(d) New place of business. Each person acquiring or establishing a place of business for the purpose of operating a salvage establishment or operating as a salvage broker shall apply for and obtain a license of such business prior to beginning operation.

(e) Two or more places of business. If the salvage establishment or salvage broker operates more than one place of business, the salvage establishment or salvage broker shall license each place of business separately.

(f) License application. Any person desiring to operate a salvage establishment or act as a salvage broker shall make written application for a license on forms provided by the department. A separate application is required for each place of business to be licensed. License application forms may be obtained from the Texas Department of Health, Bureau of Food and Drug Safety, 1100 West 49th Street, Austin, Texas 78756.

(g) Contents of license application. The salvage establishment or salvage broker license application shall be signed and verified, shall be made on a form furnished by the department, and shall contain the following information:

(1) the legal name under which the business is conducted;

(2) the address of the place of business to be licensed and the mailing address if different;

(3) the name, residence address, and driver's license number of the responsible individual in charge at the place of business;

(4) the hours of operation of each place of business;

(5) the address of any salvage warehouse used by a salvage establishment or salvage broker;

(6) if a sole proprietorship, the name of the proprietor; if a partnership, the names of all partners; if a corporation, the names and titles of all officers; in any other association, those in a managerial capacity; and

(7) a statement signed and verified by the sole proprietor, managing partner, corporate officer, or person in a managerial capacity for an association that acknowledges the applicant has read, understood, and agrees to abide by the provisions of these sections and those of the Act.

(h) Issuance of license. In accordance with §229.281 of this title (relating to Processing Permit Applications Relating to Food and Drug Operations), the department may license a salvage establishment or salvage broker who meets the requirements of these sections.

(i) Transfer of license. Licenses shall not be transferable from one person to another or from one place of business to another.

(j) Display of license. The license shall be displayed in an open public area at each place of business and each salvage operator shall have a copy of a valid license in each vehicle used by the salvage operator to transport distressed food.

(k) License expiration. Unless the department revokes or suspends a license as provided in §229.554 of this title (relating to Enforcement and Penalties), the initial license shall be valid for one year from the date of issuance which becomes the anniversary date.

(l) Renewal of license.

(1) Each year prior to the anniversary date, the salvage establishment or salvage broker shall renew its license following the requirements of this section.

(2) The renewal license shall be valid for one year from the anniversary date.

(3) The license renewal application and nonrefundable renewal fee for each place of business shall be submitted to the department 30 days prior to the expiration date of the current license in accordance with procedures of this section. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(4) The department shall renew the license of a licensee who submits a renewal application and pays the renewal fee after finding that the licensee is in compliance with these sections as determined by an inspection of the licensee's place of business or as outlined in subsection (c) of this section.

(m) Completeness of license applications. Failure to complete the initial or renewal license application form may result in the denial of a license.

(n) Report of changes. The license holder shall notify the department in writing within ten days of any change, including change in location, name, or ownership of a salvage establishment or salvage broker, which would render the information contained in the initial license application no longer accurate. Failure to inform the department within ten days of a change in information required in the initial license application may result in enforcement action as described in §229.554 of this title.

(o) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of fees as outlined in §229.546 of this title (relating to Licensing Fees).

(p) Return of license. A license issued under these sections shall be returned to the department if the place of business:

(1) ceases business or otherwise ceases operation on a permanent basis;

(2) relocates;

(3) changes the name of the business under which the salvage establishment or salvage broker operates; or

(4) changes ownership.

§229.546. Licensing Fees.

(a) Licensing fees.

(1) Annual fee. All salvage establishments and salvage brokers operating in Texas shall obtain a license annually from the department and shall pay a nonrefundable licensing fee for each place of business.

(A) Except as provided for in subparagraph (B) of this paragraph, salvage establishments and salvage brokers shall pay a nonrefundable annual licensing fee of $400.

(B) A salvage establishment or salvage broker that engages in the business of reconditioning, selling, distributing, or otherwise trafficking in distressed or salvaged devices shall pay a nonrefundable annual licensing fee of $550.

(2) Delinquency Fee. A salvage establishment or salvage broker must pay a $100 delinquency fee if:

(A) the renewal license application is submitted or the renewal license fee is paid after the expiration date of the current license; or

(B) the initial license application is submitted or the initial license fee is paid more than 30 days following the effective date of a change in location, name, or ownership of an existing salvage establishment or salvage broker as described in §229.545(o) of this title (relating to Licensing Requirements and Procedures).

(3) Reinspection fee. A salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to §229.554 of this title (relating to Enforcement and Penalties), shall pay a nonrefundable inspection fee of $400.

(b) Consolidation of multiple anniversary dates. The department may, upon receipt of a written request from a license holder, prorate an annual license fee for the purpose of consolidating the anniversary dates of multiple licenses issued in the name of the license holder.

(c) Exemption from licensing fees. A person is exempt from the licensing fees required by this section if the person is a nonprofit organization, as described in the Internal Revenue Code of 1986, §501(c)(3), as amended or a nonprofit affiliate of the organization, to the extent otherwise permitted by law.

§229.547. Personnel.

(a) Employee health requirements. No person known to be or suspected of being affected with any disease in a communicable form, or while a carrier of such disease, or while afflicted with boils, infected wounds, sores, or respiratory infection, shall work in an area of a salvage establishment or for a salvage broker in any capacity in which there is any possibility of such person contaminating salvageable or salvaged food with pathogenic organisms, or transmitting disease to other individuals.

(b) Personal cleanliness.

(1) All personnel while working in direct contact with salvageable food or while engaged in reconditioning, repacking, or otherwise handling any ingredients or components of salvageable food shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

(2) Personnel engaged in reconditioning salvageable food shall wash their hands thoroughly in a department approved hand-washing facility before starting work, and as often as may be necessary to remove soil and contamination.

(3) No person shall resume work after visiting the toilet room without first washing their hands.

§229.548. Construction and Maintenance of Physical Facilities.

(a) Buildings. Buildings used by salvage establishments and salvage brokers shall be of suitable design and contain sufficient space to perform necessary operations, prevent mix-ups, and assure orderly handling.

(b) Floor construction.

(1) The floor surfaces in all rooms and areas in which salvageable or salvaged food is stored or processed and in which utensils are washed, and walk-in refrigerators, dressing or locker rooms, and toilet rooms, shall be constructed to be smooth and easily cleanable.

(2) Any floor that is exposed to water or liquids shall be constructed and maintained to be nonabsorbent

(3) All floors shall be kept clean and in good repair.

(4) Floor drains shall be provided in all rooms where floors are subjected to flooding-type cleaning or where normal operations release or discharge water or other liquid waste on the floor.

(c) Walls and ceilings. Walls and ceilings of all rooms shall be clean, smooth, and in good repair.

(d) Lighting. Adequate lighting shall be provided in hand-washing areas, dressing and locker rooms, and toilet rooms and in areas where salvageable or salvaged foods are examined, processed, stored and where equipment or tools are cleaned.

(1) Where personnel are inspecting, sorting, or reconditioning distressed food, at least 540 lux (50 foot candles) of light shall be provided at the work surface.

(2) At all other areas of the facility where light is required, at least 110 lux (10 foot candles) of light shall be provided when measured at a distance of 30 inches above the floor.

(e) Ventilation.

(1) All rooms, in which salvageable or salvaged food is reconditioned or utensils are washed, dressing or locker rooms, toilet rooms, and garbage and rubbish storage areas shall be well ventilated.

(2) Ventilation hoods and related equipment when used shall be designed to prevent condensation from dripping onto salvageable food or onto work surfaces.

(3) Filters, when used, shall be readily removable for cleaning or replacement.

(4) Ventilation systems shall comply with applicable federal, state, and local fire prevention and air pollution requirements.

(f) Locker area. Adequate facilities shall be provided for the orderly storage of personnel clothing and personal belongings.

(g) Cleanliness of facilities.

(1) All parts of the salvage establishment or salvage warehouse and its premises shall be kept neat, clean, and free of litter and rubbish.

(2) Cleaning operations shall be conducted in such a manner as to prevent contamination of salvageable and salvaged food.

(3) None of the operations connected with a salvage establishment or salvage warehouse shall be conducted in any room used as an employee lounge or toilet facility, or living or sleeping quarters.

(4) Soiled coats and aprons shall be kept in suitable containers until removed for laundering.

(5) No birds or animals shall be allowed in any areas used for the conduct of salvage establishment operations or the storage of salvageable and salvaged food.

(h) Vehicles. Vehicles used to transport distressed, salvageable, or salvaged food shall be maintained in a clean and sanitary condition to protect the product from contamination.

§229.549. Sanitary Facilities and Controls.

(a) Water supply. The water supply shall be adequate, of a safe, sanitary quality, and from a source constructed and operated in accordance with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(b) Sewage. All sewage, including liquid waste, shall be disposed of in a public sewerage system or, in the absence thereof, in a manner applicable with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(c) Plumbing. Plumbing shall be sized, installed, and maintained in accordance with applicable state and local plumbing codes.

(d) Toilet facilities.

(1) Each salvage establishment shall provide its employees with adequate and conveniently located toilet facilities.

(2) Toilet facilities, including rooms and fixtures, shall be kept in a clean condition and in good repair at all times.

(3) The doors of all toilet rooms shall be self-closing.

(4) Toilet tissue shall be provided.

(5) Easily cleanable receptacles shall be provided for waste materials, and such receptacles in toilet rooms for women shall be covered.

(6) Where the use of non-water-carried sewage disposal facilities are approved by the department, they shall be located at least 100 linear feet from the salvage establishment and from any well or stream.

(e) Hand-washing facilities. Each salvage establishment shall be provided with adequate, conveniently located hand-washing facilities for its personnel, including a lavatory or lavatories, equipped with hot and cold or tempered running water, hand-cleansing soap or detergent, and approved sanitary towels or other approved hand-drying devices. Such facilities shall be kept clean and in good repair.

(f) Garbage and refuse.

(1) All organic or organic-containing refuse shall be kept in leak proof, non-absorbent containers which shall be kept covered with tight-fitting lids when filled or stored, or not in continuous use. Such containers shall be covered when stored and stored either in a vermin-proof room or enclosure or in a waste refrigerator.

(2) Paper, cardboard, unused equipment, and non organic refuse shall be stored in containers, rooms, or areas in such a manner to prevent it from becoming a source of contamination or pest harborage.

(3) Adequate cleaning facilities shall be provided, and each container, room, or area shall be thoroughly cleaned after the emptying or removal of refuse.

(4) All refuse shall be disposed of with sufficient frequency and in such a manner as to prevent contamination.

(5) All refuse shall be disposed of in accordance with all applicable state and local requirements, including requirements for solid waste disposal as referenced in Title 30, Texas Administrative Code, Chapters 330 and 335.

(g) Insect and rodent control. Effective measures shall be taken to protect against the entrance into the salvage establishment or salvage warehouse and the breeding or presence on the premises of rodents, insects, and other vermin.

§229.550. General Provisions for Handling and Movement of Distressed Food.

(a) Notice to the department.

(1) When the source of distressed food is the result of a natural disaster, accident, power failure, or other emergency, the salvage establishment or salvage broker shall make contact with the department's Bureau of Food and Drug Safety within 24 hours after their initial awareness of the emergency and prior to any removal of distressed food from the place at which it was located when it became distressed.

(2) If emergency removal of distressed food referenced in subsection (a)(1) of this section is required, notice to the department shall be made as soon thereafter as possible. It shall be the duty of the salvage establishment or salvage broker to make contact with the department's Bureau of Food and Drug Safety within 48 hours whenever distressed foods subject to the provisions of this subsection are obtained.

(3) Distressed food shall not be moved out of the State of Texas without the prior approval of the department and the responsible state agency in the state to receive the food. Concurrence shall also be obtained from the U.S. Food and Drug Administration, or U.S. Department of Agriculture, Food Safety and Inspection Service, prior to interstate movement.

(b) Protection of salvageable and salvaged food.

(1) All salvageable and salvaged food stored by salvage establishments or salvage brokers shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such food.

(2) All salvageable and salvaged food, while being stored or processed at a salvage establishment, salvage warehouse, or during transportation, shall be protected from contamination.

(3) Poisonous and toxic materials shall be identified and handled under such conditions as will not contaminate other salvageable or salvaged food, or constitute a hazard to personnel.

(c) Segregation of food. All salvageable food shall be promptly sorted and segregated from nonsalvageable food to prevent further contamination of the distressed food to be salvaged or offered for sale or distribution.

(d) Nonsalvageable food.

(1) Containers, including metal and glass containers with press caps, screw caps, pull rings, or other types of openings which have been in contact with nonpotable water, liquid foam, or other deleterious substances, as a result of fire fighting efforts, flood, sewer backups, or similar mishaps, shall be deemed unfit for sale or distribution, i.e., nonsalvageable food as defined in §229.543(18) of this title (relating to Definitions).

(2) Nonsalvageable food shall be disposed of as in §229.549 of this title (relating to Sanitary Facilities and Controls).

(3) Distressed food which is deemed to be nonsalvageable by a duly authorized agent of the Texas Department of Health shall,

at the request of the agent, be destroyed under the supervision of that agent at the expense of the owner.

(e) Transporting of distressed food.

(1) Distressed food shall be moved from the site of a fire, flood, sewer backup, wreck, or other cause as expeditiously as possible after compliance with subsection (a) of this section so as not to become putrid, rodent or insect defiled, or otherwise hazardous to public health.

(2) All distressed and salvageable food of a perishable nature shall, prior to reconditioning, be transported only in vehicles provided with adequate refrigeration, if necessary, for product maintenance.

(f) Handling of distressed articles other than foods. If distressed articles other than foods are also salvaged, they shall be handled separately so as to prevent contamination from poisonous and toxic materials or other contaminants.

(g) Cross-contamination protection. Sufficient precautions shall be taken to prevent cross-contamination (animal feed to human food, etc.) among the various types of foods which are salvageable or salvaged.

(h) Salvageable food. All salvageable food shall be reconditioned prior to sale or distribution except for such sale or distribution to a person holding a valid license to engage in a salvage operation.

(i) Reconditioned food. All reconditioned food must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(j) Labeling. All salvaged food must be labeled in accordance with the requirements of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431; the Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §301, et seq. as amended; the Fair Packaging and Labeling Act, 15 U.S.C., §1451 et seq. as amended; and the federal regulations promulgated under those Acts.

(k) Salvage warehouses. A person may not use a salvage warehouse to recondition food or sell to consumers.

§229.551. Handling Distressed Food.

(a) Good manufacturing practices. A person must follow and comply with the requirements of §§229.211 - 229.222 of this title (relating to Current Good Manufacturing Practice and Good Warehousing Practice in Manufacturing, Packing, or Holding Human Food) in the handling and reconditioning of all distressed and/or salvaged food.

(b) Perishable foods. All perishable foods shall be kept at a temperature that will provide protection against spoilage.

(c) Potentially hazardous foods. All potentially hazardous foods shall be maintained at a safe temperature, 41 degrees Fahrenheit (5 degrees Celsius) or below; 140 degrees Fahrenheit (60 degrees Celsius) or above.

(d) Frozen Foods. Frozen foods shall be kept frozen at all times.

(e) Distressed or nonsalvageable food.

(1) All metal cans of food offered for sale or distribution shall be essentially free from rust (pitting) and dents (especially at rim, end double seams, and/or side seams).

(2) Leakers, springers, flippers, and swells shall be deemed unfit for sale or distribution.

(f) Metal containers of food. All metal containers of food, other than those mentioned in subsection (e) of this section, whose integrity has not been compromised and whose integrity would not be compromised by the reconditioning, and which have been partially or totally submerged in water, liquid foam, or other deleterious substance as the result of flood, sewer backup, or other reasons shall, after thorough cleaning, be subjected to sanitizing rinse of a concentration of 100 parts per million (ppm) available chlorine for a minimum period of one minute, or shall be sanitized by another method approved by the department. They shall subsequently be treated to inhibit rust formation.

(g) Label removal.

(1) Any cans or tins showing surface rust shall have labels removed, the outer surface cleaned by buffing, a protective coating applied where necessary, and shall be relabeled.

(2) Relabeling of other salvageable nonmetal (glass, plastic, etc.) containers shall be required when original labels are missing or illegible.

(h) Relabeling. All salvaged food in containers shall be provided with labels meeting the requirements in §229.550(j) of this title (relating to General Provisions for Handling and Movement of Distressed Food). Where original labels are removed from containers which are to be resold or redistributed, the replacement labels must show the name and address of the salvage establishment.

§229.552. Records.

(a) Inventory records. A written record or receipt of distressed, salvageable, and salvaged food shall be maintained by the salvage establishment or salvage broker and shall include:

(1) the common name and brand name or manufacturer and quantity of the food received;

(2) the source of the distressed food;

(3) the date received;

(4) a brief description of the type of damage (fire, flood, warehouse damage, overstock, etc.); and

(5) the name of the individual or business that purchases any such food for the purpose of sale or distribution and the date of any such transaction.

(b) Retention of records. All records required in these sections shall be kept at the place of business of the salvage establishment or salvage broker for a period of two years following the completion of transactions involving a lot of food.

(c) Electronic records. Records required by these sections which are maintained by the salvage establishment or salvage broker on computer systems shall be regularly copied, at least monthly, and updated on storage media other than the hard drive of the computer. An electronic record must be retrievable as a printed copy.

§229.553. Inspection.

(a) Inspection. To enforce these sections of the Act, the commissioner, an authorized agent, or a health authority may, on presenting appropriate credentials to the owner, operator, or agent in charge of a place of business:

(1) enter at reasonable times the place of business of a salvage establishment or salvage broker;

(2) enter a salvage warehouse used to store or hold distressed or salvaged food;

(3) enter a vehicle being used to transport or hold distressed or salvaged food; or

(4) inspect at reasonable times, any place of business of a salvage establishment or salvage broker, salvage warehouse, or vehicle

and all equipment, finished and unfinished materials, containers, and labeling of any item and obtain samples necessary for the enforcement of these sections or the Act.

(b) Access to records. A person who is required to maintain records referenced in these sections or under the Act or a person who is in charge or custody of those records shall, at the request of an authorized agent or health authority, permit the authorized agent or health authority at all reasonable times access to review, copy, and verify the records.

(c) Access to records showing movement in commerce. A person who is subject to licensing under §229.545 of this title (relating to Licensing Requirements and Procedures) or a person, including a common carrier or the common carrier's agent, who disposes of or otherwise transfers distressed or salvaged food shall, at the request of the commissioner or an authorized agent, permit the commissioner or authorized agent at all reasonable times access to review, copy, and verify all records showing:

(1) the movement in commerce of any distressed or salvaged food;

(2) the holding of any distressed or salvaged food after movement in commerce; and

(3) the quantity, shipper, and consignee of any distressed or salvaged food.

(d) Receipt for samples. An authorized agent or health authority who makes an inspection of a place of business, including any vehicle or salvage warehouse, and obtains a sample during or on completion of the inspection and before leaving the place of business, shall give to the owner, operator, or the owner's or operator's agent a receipt describing the sample.

§229.554. Enforcement and Penalties.

(a) General license actions. The department may deny, suspend, or revoke the license of an applicant or licensee who fails to comply with the Act or these sections.

(b) License denials.

(1) The department may deny an application for a license if the applicant fails to meet the standards or requirements of the Act or these sections.

(2) The department shall give the applicant written notice of the denial, the reasons for the denial, and opportunity for a hearing.

(c) Emergency license suspensions.

(1) The department may suspend a license without notice when there is an imminent threat to the health and safety of the public.

(2) If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(d) Nonemergency license suspensions.

(1) The department may suspend a license when the licensee violates any one of the following requirements:

(A) failure to comply with the Act or these sections; or

(B) falsification of information provided in an application for a license.

(2) The department shall give the licensee written notice of the proposed suspension, including the reasons for the suspension and an opportunity for a hearing.

(e) License revocations.

(1) The department may revoke a license when the licensee:

(A) violates the provisions of the Act or these sections;

(B) refuses to allow the department to conduct an inspection or collect samples;

(C) interferes with the department in the performance of its duties;

(D) removes or disposes of a detained food in violation of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.021; or

(E) fails to inform the department of any salvage warehouse(s) at the time of an inspection or when requested by the department.

(2) Prior to revoking the license, the department shall give the licensee written notice of the proposed revocation, including the reasons for the revocation and an opportunity for a hearing.

(f) License hearings.

(1) Any hearings for the denial, suspension, emergency suspension, or revocation of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to the Texas Board of Health) and the Administrative Procedure Act, Government Code, Chapter 2001.

(2) Within ten days after an emergency suspension or within 20 days after the postmark date of the department's written notice of proposed denial, suspension, or revocation, the applicant or licensee may request a hearing in writing from the department's Bureau of Food and Drug Safety. If the applicant or licensee does not request a hearing during the required time period, then the applicant or licensee is deemed to have waived his/her right to a hearing.

(g) Reinstatement of license.

(1) A person whose application for a license has been denied or whose license has been placed under an emergency suspension may request a reinspection for the purpose of granting or reinstating a license not later than the 30th day after the denial or emergency suspension. Not later than the 10th day after the receipt of a written request from the applicant or licensee, the department shall make a reinspection.

(2) As regards a nonemergency suspension or a revocation, the licensee may request at any time, an inspection for reinstating the license or for issuing a new license.

(3) If, after inspection, the department determines that the applicant or licensee meets the requirements of the Act or these sections, the department shall reinstate the license or issue a new license, as appropriate.

(4) Reinspection fee. Except as provided for in §229.546(c) of this title (relating to Licensing Fees), a salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to this section shall pay a nonrefundable inspection fee of $400.

(h) Emergency order.

(1) General. The commissioner or the commissioner's designee may issue an emergency order, either mandatory or prohibitory, concerning the sale or distribution of distressed foods in the department's jurisdiction if the commissioner or the commissioner's designee determines that:

(A) the sale or distribution of those foods creates or poses an immediate and serious threat to human life or health; and

(B) other procedures available to the department to remedy or prevent the threat will result in unreasonable delay.

(2) Absence of notice and hearing. The commissioner or the commissioner's designee may issue the emergency order without notice and hearing if the commissioner or the commissioner's designee determines it is necessary under the circumstances.

(3) Hearings. If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(i) Administrative penalty. If a person violates these sections, or an order adopted or license issued under the Act, the commissioner may assess an administrative penalty against the person.

(1) The penalty may not exceed $25,000 for each violation. Each day a violation continues is a separate violation.

(2) In determining the amount of the penalty, the commissioner shall consider the following criteria:

(A) the person's previous violations;

(B) the seriousness of the violation;

(C) any hazard to the health and safety of the public;

(D) the person's demonstrated good faith; and

(E) other matters as justice may require.

(3) Violations subject to this subsection shall be categorized into severity levels as determined in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties).

(4) Hearings, appeals from, and judicial review of final administrative decisions under this subsection shall be conducted according to the contested case provisions of the Government Code, Chapter 2001, and the board's formal hearing rules found in Chapter 1 of this title.

(5) An administrative penalty may be assessed only after a person charged with a violation is given an opportunity for a hearing.

(6) If a hearing is held, the commissioner shall make findings of fact and shall issue a written decision regarding the occurrence of the violation and the amount of the penalty.

(7) If the person charged with the violation does not request a hearing, the commissioner may assess a penalty after determining that a violation has occurred and the amount of the penalty.

(8) After making a determination under this subsection that a penalty is to be assessed, the commissioner shall issue an order requiring that the person pay the penalty.

(9) The commissioner may consolidate a hearing held under this subsection with another proceeding.

(10) Not later than the 30th day after the date of issuance of an order finding that a violation has occurred, the commissioner shall inform the person against whom the order is issued of the amount of the penalty.

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

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Susan Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER BB. REGULATION OF DRUG SALVAGE ESTABLISHMENTS AND BROKERS

25 TAC §§229.571- 229.584

The new sections are proposed under Health and Safety Code, §432.011, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 432; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new sections affect Health and Safety Code, Chapter 432; and Government Code, §2001.039.

§229.571. Purpose.

These sections provide for the licensing and regulation of drug salvage establishments and brokers to prevent the sale or distribution of adulterated or misbranded drugs to consumers.

§229.572. Applicable Laws and Regulations.

(a) A salvage establishment or salvage broker who is subject to these sections and who is also involved in the reconditioning, sale, or distribution of distressed or salvaged medical devices, foods, or cosmetics must comply with the applicable requirements in Subchapter AA of this chapter (relating to Regulation of Food Salvage Establishments and Brokers), Subchapter CC of this chapter (relating to Regulation of Device Salvage Establishments and Brokers), and Subchapter DD of this chapter (relating to Regulation of Cosmetic Salvage Establishments and Brokers).

(b) The Texas Department of Health (department) adopts by reference the following federal laws and regulations:

(1) Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §301 et seq. as amended;

(2) Fair Packaging and Labeling Act, 15 U.S.C., §1451 et seq. as amended;

(3) Section 501(c)(3), Internal Revenue Code of 1986, as amended;

(4) 21 Code of Federal Regulations (CFR), Part 205, §§205.1 - 205.50, titled "Guidelines for State Licensing of Wholesale Prescription Drug Distributors," as amended;

(5) 21 CFR Part 210, §§210.1 - 210.3, titled "Current Good Manufacturing, Processing, Packing, or Holding of Drugs" as amended, and §§211.1 - 211.208, titled "Current Good Manufacturing Practice for Finished Pharmaceuticals" as amended.

(c) Copies of these laws and regulations are indexed and filed in the office of the Bureau of Food and Drug Safety, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours. Electronic copies of these laws and regulations are available from the Drugs and Medical Devices Division website at http://www.tdh.state.tx.us/bfds/dmd.

(d) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable federal laws and regulations.

§229.573. Definitions.

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

(1) Act - The Texas Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, Chapter 432.

(2) Adulterated drug - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.111.

(3) Authorized Agent - An employee of the department who is designated by the commissioner to enforce the provisions of this chapter.

(4) Board - The Texas Board of Health.

(5) Change of ownership - A sole proprietor who transfers all or part of the salvage establishment or salvage broker business to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a salvage establishment or salvage broker business owned by a partnership; a corporate sale, transfer; reorganization; or merger of the corporation which owns the salvage establishment or salvage broker business if the sale, transfer, reorganization, or merger causes a change in the salvage establishment's or salvage broker business's ownership to another person or persons; or if any other type of association, the removal, addition, or substitution of a person or persons as a principal of such association.

(6) Commissioner - The Commissioner of Health.

(7) Department - The Texas Department of Health.

(8) Device - An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component; part, or accessory; that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in manor other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(9) Distressed drug - Any drug that is adulterated or misbranded within the meaning of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §§431.111 and 431.112. The term includes a drug that:

(A) has lost its labeling or is otherwise unidentified;

(B) has been subjected to prolonged or improper storage, including unsanitary conditions whereby the drug may have become contaminated with filth or whereby it may be been rendered injurious to health;

(C) has been subjected for any reason to abnormal environmental condition, including temperature extremes, humidity, smoke, water, fumes, pressure, or radiation;

(D) has been subjected to conditions that result in either its strength, purity, or quality falling below that which it purports or is represented to possess; or

(E) has been rendered unsafe or unsuitable for human consumption or use for any other reason.

(10) Drug -

(A) an article or substance recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, the official National Formulary, or any supplement of them;

(B) an article or substance designed or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) an article or substance intended for use as a component of any article or substance specified in this definition.

(11) Drug Manufacturer - Includes a person who manufactures, prepares, propagates, compounds, processes, repackages, or changes the container, wrapper, or labeling of any drug.

(12) Food -

(A) any article of food or drink for man;

(B) chewing gum; or

(C) an article used for components of any such article.

(13) Labeling - All labels and other written, printed, or graphic matter:

(A) upon any article or any of its containers or wrappers; or

(B) accompanying such article.

(14) Manufacture - The combining, preparing, propagation, compounding, purifying, processing, packing, repacking, wrapping, and labeling of drugs.

(15) Misbranded drug - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.112.

(16) Nonprofit organization - An organization that has received an exemption from federal taxation under 26 U.S.C., §501(c)(3).

(17) Nonsalvageable drug - Distressed drug, as defined in this section, which cannot be safely or practically reconditioned.

(18) Perishable - Capable of spoilage or deterioration due to improper refrigeration or handling.

(19) Person - An individual, corporation, business trust, estate, trust, partnership, association, or any other public or private legal entity.

(20) Personnel - Any person employed by a salvage establishment or salvage broker who does or may in any manner handle or come in contact with the handling, storing, transporting, or selling and distributing of salvageable or salvaged drugs.

(21) Place of business - Each location from which a salvage establishment or salvage broker operates.

(22) Practitioner - A person licensed by the Texas State Board of Medical Examiners, State Board of Dental Examiners, Texas

State Board of Podiatric Medical Examiners, Texas Optometry Board, or State Board of Veterinary Medical Examiners to prescribe and administer prescription drugs.

(23) Reconditioning - Any appropriate process or procedure by which distressed drugs can be brought into compliance with the standards of the department for consumption or use by the public. In addition, all reconditioned drugs must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(24) Sale or distribution - The act of selling or distributing, whether for compensation or not, and includes delivery, holding, or offering for sale, transfer, auction, storage, or other means of handling or trafficking.

(25) Salvage broker - A person who engages in the business of selling, distributing, or otherwise trafficking in any distressed or salvaged food, drug, device, or cosmetic and who does not operate a salvage establishment.

(26) Salvage establishment - Any place of business engaged in reconditioning or by other means salvaging distressed food, drugs, devices, or cosmetics, or that sells, buys, or distributes for human use any salvaged food, drug, device, or cosmetic. For the purpose of licensing under these sections, a drug reclamation center is a salvage establishment.

(27) Salvage operator - A person who is engaged in the business of operating a salvage establishment.

(28) Salvage warehouse - A separate storage facility used by a salvage broker or salvage establishment for the purpose of holding distressed or salvaged drug.

(29) Salvageable drug - Any distressed drug, as defined in this section, which can be reconditioned to departmental standards.

(30) Salvaged drug - Any distressed drug that has been reconditioned.

(31) Sanitize - Adequate treatment of surfaces by a process that is effective in destroying vegetative cells of microorganisms of public health significance and in substantially reducing numbers of other microorganisms. Such treatments shall not adversely affect the product and shall be safe to the consumer.

(32) Vehicles - Any truck, car, bus, or other means by which distressed, salvageable, or salvaged drugs is transported from one location to another.

§229.574. Exemptions and Applicability.

(a) A person is exempt from licensing under these sections if the person is:

(1) a manufacturer, distributor, or processor of a drug who in the normal course of business engages in the activities of reconditioning the items manufactured, distributed, or processed by or for that person and not purchased by that person solely for the purpose of reconditioning and sale;

(2) a common carrier or the common carrier's agent who disposes of or otherwise transfers undamaged or distressed drugs to a person who is exempt under this section or to a licensed salvage broker or salvage operator; or

(3) a person who transfers distressed drugs to a licensed salvage broker or salvage operator.

(b) An exemption from the licensing requirements under these sections does not constitute an exemption from other applicable provisions of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, or the rules adopted to administer and enforce the Act.

(c) A salvage establishment or salvage broker who is engaging only within the scope of the license issued under §229.575 of this title (relating to Licensing Requirements and Procedures) is not required to also be licensed under Health and Safety Code, Chapter 431. An exemption from the licensing requirements under Health and Safety Code, Chapter 431, does not constitute an exemption from other applicable provisions of the Health and Safety Code, Chapter 431, or the rules adopted to administer and enforce the chapter.

§229.575. Licensing Requirements and Procedures.

(a) General. Except as provided by §229.574 of this title (relating to Exemptions and Applicability), it shall be unlawful for any person to operate a salvage establishment or operate as a salvage broker within the State of Texas, who does not possess a current and valid license issued by the department.

(b) Licensing of out-of-state salvage establishments and brokers. A person who operates a salvage establishment or acts as a salvage broker outside this state may not sell, distribute, or otherwise traffic in distressed or salvaged food, drugs, devices, or cosmetics within this state unless the person holds a license from the department.

(c) Reports from other jurisdictions. The department may accept reports from authorities in other jurisdictions to determine the extent of compliance with these sections and with the provisions of the Act.

(d) New place of business. Each person acquiring or establishing a place of business for the purpose of operating a salvage establishment or operating as a salvage broker shall apply for and obtain a license of such business prior to beginning operation.

(e) Two or more places of business. If the salvage establishment or salvage broker operates more than one place of business, the salvage establishment or salvage broker shall license each place of business separately.

(f) License application. Any person desiring to operate a salvage establishment or act as a salvage broker shall make written application for a license on forms provided by the department. A separate application is required for each place of business to be licensed. License application forms may be obtained from the Texas Department of Health, Bureau of Food and Drug Safety, 1100 West 49th Street, Austin, Texas 78756.

(g) Contents of license application. The salvage establishment or salvage broker license application shall be signed and verified, shall be made on a form furnished by the department, and shall contain the following information:

(1) the legal name under which the business is conducted;

(2) the address of the place of business to be licensed and the mailing address if different;

(3) the address of any salvage warehouse used by a salvage establishment or salvage broker;

(4) if a sole proprietorship, the name of the proprietor; if a partnership, the names of all partners; if a corporation, the names and titles of all officers; in any other association, those in a managerial capacity; and

(5) a statement signed and verified by the sole proprietor, managing partner, corporate officer, or person in a managerial capacity for an association that acknowledges the applicant has read, understood, and agrees to abide by the provisions of these sections and those of the Act.

(h) Issuance of license. In accordance with §229.281 of this title (relating to Processing Permit Applications Relating to Food and Drug Operations), the department may license a salvage establishment or salvage broker who meets the requirements of these sections.

(i) Transfer of license. Licenses shall not be transferable from one person to another or from one place of business to another.

(j) Display of license. The license shall be displayed in an open public area at each place of business and each salvage operator shall have a copy of a valid license in each vehicle used by the salvage operator to transport distressed drugs.

(k) License expiration. Unless the department revokes or suspends a license as provided in §229.584 of this title (relating to Enforcement and Penalties), the initial license shall be valid for one year from the date of issuance which becomes the anniversary date.

(l) Renewal of license.

(1) Each year prior to the anniversary date, the salvage establishment or salvage broker shall renew its license following the requirements of this section.

(2) The renewal license shall be valid for one year from the anniversary date.

(3) The license renewal application and nonrefundable renewal fee for each place of business shall be submitted to the department 30 days prior to the expiration date of the current license in accordance with procedures of this section. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(4) The department shall renew the license of a licensee who submits a renewal application and pays the renewal fee after finding that the licensee is in compliance with these sections as determined by an inspection of the licensee's place of business or as outlined in subsection (c) of this section.

(m) Completeness of license applications. Failure to complete the initial or renewal license application form may result in the denial of a license.

(n) Report of changes. The license holder shall notify the department in writing within ten days of any change, including change in location, name, or ownership of a salvage establishment or salvage broker, which would render the information contained in the initial license application no longer accurate. Failure to inform the department within ten days of a change in information required in the initial license application may result in enforcement action as described in §229.584 of this title.

(o) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of fees as outlined in §229.576 of this title (relating to Licensing Fees).

(p) Return of license. A license issued under these sections shall be returned to the department if the place of business:

(1) ceases business or otherwise ceases operation on a permanent basis;

(2) relocates;

(3) changes the name of the business under which the salvage establishment or salvage broker operates; or

(4) changes ownership.

§229.576. Licensing Fees.

(a) Licensing fees.

(1) Annual fee. All salvage establishments and salvage brokers operating in Texas shall obtain a license annually from the department and shall pay a nonrefundable fee for each place of business.

(A) Except as provided for in subparagraph (B) of this paragraph, salvage establishments and salvage brokers shall pay a nonrefundable annual licensing fee of $400.

(B) A salvage establishment or salvage broker that engages in the business of reconditioning, selling, distributing, or otherwise trafficking in distressed or salvaged devices shall pay a nonrefundable annual licensing fee of $550.

(2) Delinquency fee. A salvage establishment or salvage broker must pay a $100 delinquency fee if:

(A) the renewal license application is submitted or the renewal license fee is paid after the expiration date of the current license; or

(B) the initial license application is submitted or the initial license fee is paid more than 30 days following the effective date of a change in location, name, or ownership of an existing salvage establishment or salvage broker as described in §229.575(o) of this title (relating to Licensing Requirements and Procedures).

(3) Reinspection fee. A salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to §229.584 of this title (relating to Enforcement and Penalties), shall pay a nonrefundable inspection fee of $400.

(b) Consolidation of multiple anniversary dates. The department may, upon receipt of a written request from a license holder, prorate an annual license fee for the purpose of consolidating the anniversary dates of multiple licenses issued in the name of the license holder.

(c) Exemption from licensing fees. A person is exempt from the licensing fees required by this section if the person is a nonprofit organization, as described in the Internal Revenue Code of 1986, §501(c)(3), as amended, or a nonprofit affiliate of the organization, to the extent otherwise permitted by law.

§229.577. Personnel.

(a) Employee health requirements. No person known to be or suspected of being affected with any disease in a communicable form, or while a carrier of such disease, or while afflicted with boils, infected wounds, sores, or respiratory infection, shall work in an area of a salvage establishment or for a salvage broker in any capacity in which there is any possibility of such person contaminating salvageable or salvaged drugs with pathogenic organisms, or transmitting disease to other individuals.

(b) Personal cleanliness.

(1) All personnel while working in direct contact with salvageable drugs or while engaged in reconditioning, repacking, or otherwise handling any ingredients or components of salvageable drugs shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

(2) Personnel engaged in reconditioning salvageable drugs shall wash their hands thoroughly in a department approved hand-washing facility before starting work, and as often as may be necessary to remove soil and contamination.

(3) No person shall resume work after visiting the toilet room without first washing their hands.

§229.578. Construction and Maintenance of Physical Facilities.

(a) Buildings. Buildings used by salvage establishments and salvage brokers shall be of suitable design and contain sufficient space to perform necessary operations, prevent mix-ups, and assure orderly handling.

(b) Floor construction.

(1) The floor surfaces in all rooms and areas in which salvageable or salvaged drugs are stored or processed and in which utensils are washed, and walk-in refrigerators, dressing or locker rooms, and toilet rooms, shall be constructed to be smooth and easily cleanable.

(2) Any floor that is exposed to water or liquids shall be constructed and maintained to be nonabsorbent.

(3) All floors shall be kept clean and in good repair.

(4) Floor drains shall be provided in all rooms where floors are subjected to flooding-type cleaning or where normal operations release or discharge water or other liquid waste on the floor.

(c) Walls and ceilings. Walls and ceilings of all rooms shall be clean, smooth, and in good repair.

(d) Lighting. Adequate lighting shall be provided in hand washing areas, dressing and locker rooms, and toilet rooms and in areas where salvageable or salvaged devices are examined, processed, stored and where equipment or tools are cleaned.

(1) Where personnel are inspecting, sorting, or reconditioning distressed drug, at least 540 lux (50 foot candles) of light shall be provided at the work surface.

(2) At all other areas of the facility where light is required, at least 110 lux (ten foot candles) of light shall be provided when measured at a distance of 30 inches above the floor.

(e) Ventilation.

(1) All rooms, in which salvageable or salvaged drugs are reconditioned or utensils are washed, dressing or locker rooms, toilet rooms, and garbage and rubbish storage areas shall be well ventilated.

(2) Ventilation hoods and related equipment when used shall be designed to prevent condensation from dripping onto salvageable drugs or onto work surfaces.

(3) Filters, when used, shall be readily removable for cleaning or replacement.

(4) Ventilation systems shall comply with applicable federal, state, and local fire prevention and air pollution requirements.

(f) Locker area. Adequate facilities shall be provided for the orderly storage of personnel clothing and personal belongings.

(g) Cleanliness of facilities.

(1) All parts of the salvage establishment or salvage warehouse and its premises shall be kept neat, clean, and free of litter and rubbish.

(2) Cleaning operations shall be conducted in such a manner as to prevent contamination of salvageable and salvaged drugs.

(3) None of the operations connected with a salvage establishment or salvage warehouse shall be conducted in any room used as an employee lounge or toilet facility, or living or sleeping quarters.

(4) Soiled coats and aprons shall be kept in suitable containers until removed for laundering.

(5) No birds or animals shall be allowed in any areas used for the conduct of salvage establishment operations or the storage of salvageable and salvaged drugs.

(h) Vehicles. Vehicles used to transport distressed, salvageable, or salvaged drugs shall be maintained in a clean and sanitary condition to protect the product from contamination.

§229.579. Sanitary Facilities and Controls.

(a) Water supply. The water supply shall be adequate, of a safe, sanitary quality, and from a source constructed and operated in accordance with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(b) Sewage. All sewage, including liquid waste, shall be disposed of in a public sewerage system or, in the absence thereof, in a manner applicable with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(c) Plumbing. Plumbing shall be sized, installed, and maintained in accordance with applicable state and local plumbing codes.

(d) Toilet facilities.

(1) Each salvage establishment shall provide its employees with adequate and conveniently located toilet facilities.

(2) Toilet facilities, including rooms and fixtures, shall be kept in a clean condition and in good repair at all times.

(3) The doors of all toilet rooms shall be self-closing.

(4) Toilet tissue shall be provided.

(5) Easily cleanable receptacles shall be provided for waste materials, and such receptacles in toilet rooms for women shall be covered.

(6) Where the use of non-water-carried sewage disposal facilities are approved by the department they shall be located at least 100 linear feet from the salvage establishment and from any well or stream.

(e) Hand-washing facilities. Each salvage establishment shall be provided with adequate, conveniently located hand-washing facilities for its personnel, including a lavatory or lavatories, equipped with hot and cold or tempered running water, hand-cleansing soap or detergent, and approved sanitary towels or other approved hand-drying devices. Such facilities shall be kept clean and in good repair.

(f) Garbage and refuse.

(1) All organic or organic-containing refuse shall be kept in leak proof, non-absorbent containers which shall be kept covered with tight-fitting lids when filled or stored, or not in continuous use. Such containers shall be covered when stored and stored either in a vermin-proof room or enclosure or in a waste refrigerator.

(2) Paper, cardboard, unused equipment, and non organic refuse shall be stored in containers, rooms, or areas in such a manner to prevent it from becoming a source of contamination or pest harborage.

(3) Adequate cleaning facilities shall be provided, and each container, room, or area shall be thoroughly cleaned after the emptying or removal of refuse.

(4) All refuse shall be disposed of with sufficient frequency and in such a manner as to prevent contamination.

(5) All refuse shall be disposed of in accordance with all applicable state and local requirements, including requirements for

solid waste disposal as referenced in Title 30, Texas Administrative Code, Chapters 330, 335, and 336.

(g) Insect and rodent control. Effective measures shall be taken to protect against the entrance into the salvage establishment or salvage warehouse and the breeding or presence on the premises of rodents, insects, and other vermin.

§229.580. General Provisions for Handling and Movement of Distressed Drugs.

(a) Notice to the department.

(1) When the source of distressed drugs is the result of a natural disaster, accident, power failure, or other emergency, the salvage establishment or salvage broker shall make contact with the department's Bureau of Food and Drug Safety within 24 hours after their initial awareness of the emergency and prior to any removal of distressed drug from the place at which it was located when it became distressed.

(2) If emergency removal of distressed drugs referenced in subsection (a)(1) of this section is required, notice to the department shall be made as soon thereafter as possible. It shall be the duty of the salvage establishment or salvage broker to make contact with the department's Bureau of Food and Drug Safety within 48 hours whenever distressed drugs subject to the provisions of this subsection are obtained.

(3) Distressed drugs shall not be moved out of the State of Texas without the prior approval of the department and the responsible state agency in the state to receive the drugs. Concurrence shall also be obtained from the U.S. Food and Drug Administration, or U.S. Department of Agriculture, Food Safety and Inspection Service, prior to interstate movement.

(b) Protection of Salvageable and Salvaged Drugs.

(1) All salvageable and salvaged drugs stored by salvage establishments or salvage brokers shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such drugs.

(2) All salvageable and salvaged drugs, while being stored or processed at a salvage establishment, salvage warehouse, or during transportation, shall be protected from contamination.

(3) Poisonous and toxic materials shall be identified and handled under such conditions as will not contaminate other salvageable or salvaged drugs, or constitute a hazard to personnel.

(c) Segregation of drugs. All salvageable drugs shall be promptly sorted and segregated from nonsalvageable drugs to prevent further contamination of the distressed drugs to be salvaged or offered for sale or distribution.

(d) Nonsalvageable drugs.

(1) Containers, including metal and glass containers with press caps, screw caps, pull rings, or other types of openings which have been in contact with nonpotable water, liquid foam, or other deleterious substances, as a result of fire fighting efforts, flood, sewer backups, or similar mishaps, shall be deemed unfit for sale or distribution, i.e., nonsalvageable drugs as defined in §229.573(17) of this title (relating to Definitions).

(2) Nonsalvageable drug shall be disposed of as in §229.579 of this title (relating to Sanitary Facilities and Controls).

(3) Distressed drugs which are deemed to be nonsalvageable by a duly authorized agent of the Texas Department of Health shall, at the request of the agent, be destroyed under the supervision of that agent at the expense of the owner.

(e) Transporting of distressed drugs.

(1) Distressed drugs shall be moved from the site of a fire, flood, sewer backup, wreck, or other cause as expeditiously as possible after compliance with subsection (a) of this section so as not to become putrid, rodent or insect defiled, or otherwise hazardous to public health.

(2) All distressed and salvageable drugs of a perishable nature shall, prior to reconditioning, be transported only in vehicles provided with adequate refrigeration, if necessary, for product maintenance.

(f) Handling of distressed articles other than drugs. If distressed articles other than drugs are also salvaged, they shall be handled separately so as to prevent contamination from poisonous and toxic materials or other contaminants.

(g) Cross-contamination protection. Sufficient precautions shall be taken to prevent cross-contamination among the various types of drugs that are salvageable or salvaged.

(h) Salvageable drugs. All salvageable drugs shall be reconditioned prior to sale or distribution except for such sale or distribution to a person holding a valid license to engage in a salvage operation.

(i) Reconditioned drugs. All reconditioned drugs must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(j) Labeling. All salvaged drugs must be labeled in accordance with the requirements of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431; the Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §301 et seq. as amended; the Fair Packaging and Labeling Act, 15 U.S.C., §1451 et seq. as amended; and the federal regulations promulgated under those Acts.

(k) Salvage warehouses. A person may not use a salvage warehouse to recondition drugs or sell to consumers.

§229.581. Handling Distressed Drugs.

(a) Good manufacturing practices. A person must follow and comply with the requirements in 21 CFR, Parts 205, §§205.1 - 205.50, titled "Guidelines for State Licensing of Wholesale Prescription Drug Distributors," as amended, 21 CFR Part 210, §§210.1 - 210.3, titled "Current Good Manufacturing, Processing, Packing, or Holding of Drugs" as amended, and §§211.1 - 211.208, titled "Current Good Manufacturing Practice for Finished Pharmaceuticals" as amended, in the handling and reconditioning of all salvaged drugs.

(b) Distressed or nonsalvageable drugs. All distressed or nonsalvageable drugs shall be disposed of in accordance with §229.579(f) of this title (relating to Sanitary Facilities and Controls).

(c) Relabeling. All salvaged drugs in containers shall be provided with labels meeting the requirements in §229.580(i) of this title (relating to General Provisions for Handling and Movement of Distressed Drugs). Where original labels are removed from containers that are to be resold or redistributed, the replacement labels must show the name and address of the salvage establishment.

(d) Procedures. All salvage establishments shall have written procedure for identifying and retrieving over-the-counter and prescription drug products that are subject to recall.

§229.582. Records.

(a) Inventory Records. A written record or receipt of distressed, salvageable, and salvaged drugs shall be maintained by the salvage establishment or salvage broker and shall include:

(1) the common name and brand name or manufacturer and quantity of the drug received;

(2) the source of the distressed, salvageable, and salvaged drugs;

(3) the date received;

(4) a brief description of the type or cause of damage (fire, flood, wreck, prolonged storage, warehouse damage, etc.); and

(5) the name of the individual or business that purchases any such drugs for the purpose of sale or distribution and the date of any such transaction.

(b) Retention of records. All records required in these sections shall be kept at the place of business of the salvage establishment or salvage broker for a period of two years following the completion of transactions involving a lot of drugs.

(c) Electronic records. Records required by these sections which are maintained by the salvage establishment or salvage broker on computer systems shall be regularly copied, at least monthly, and updated on storage media other than the hard drive of the computer. An electronic record must be retrievable as a printed copy.

§229.583. Inspection.

(a) Inspection. To enforce these sections or the Act, the commissioner, an authorized agent, or a health authority may, on presenting appropriate credentials to the owner, operator, or agent in charge of a place of business:

(1) enter at reasonable times the place of business of a salvage establishment or salvage broker;

(2) enter a salvage warehouse used to store or hold distressed or salvaged drug;

(3) enter a vehicle being used to transport or hold distressed or salvaged drug; or

(4) inspect at reasonable times, any place of business of a salvage establishment or salvage broker, salvage warehouse, or vehicle and all equipment, finished and unfinished materials, containers, and labeling of any item and obtain samples necessary for the enforcement of these sections or the Act.

(b) Access to records. A person who is required to maintain records referenced in these sections or under the Act or a person who is in charge or custody of those records shall, at the request of an authorized agent or health authority, permit the authorized agent or health authority at all reasonable times access to review, copy, and verify the records.

(c) Access to records showing movement in commerce. A person who is subject to licensing under §229.575 of this title (relating to Licensing Requirements and Procedures) or a person, including a common carrier or the common carrier's agent, who disposes of or otherwise transfers distressed or salvaged drugs shall, at the request of the commissioner or an authorized agent, permit the commissioner or authorized agent at all reasonable times access to review, copy, and verify all records showing:

(1) the movement in commerce of any distressed or salvaged drug;

(2) the holding of any distressed or salvaged drug after movement in commerce; and

(3) the quantity, shipper, and consignee of any distressed or salvaged drug.

(d) Receipt for samples. An authorized agent or health authority who makes an inspection of a place of business, including any vehicle or salvage warehouse, and obtains a sample during or on completion of the inspection and before leaving the place of business, shall give to the owner, operator, or the owner's or operator's agent a receipt describing the sample.

§229.584. Enforcement and Penalties.

(a) General license actions. The department may deny, suspend, or revoke the license of an applicant or licensee who fails to comply with the Act or these sections.

(b) License denials.

(1) The department may deny an application for a license if the applicant fails to meet the standards or requirements of the Act or these sections.

(2) The department shall give the applicant written notice of the denial, the reasons for the denial, and opportunity for a hearing.

(c) Emergency license suspensions.

(1) The department may suspend a license without notice when there is an imminent threat to the health and safety of the public.

(2) If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(d) Nonemergency license suspensions.

(1) The department may suspend a license when the licensee violates any one of the following requirements:

(A) failure to comply with the Act or these sections; or

(B) falsification of information provided in an application for a license.

(2) The department shall give the licensee written notice of the proposed suspension, including the reasons for the suspension and an opportunity for a hearing.

(e) License revocations.

(1) The department may revoke a license when the licensee:

(A) violates the provisions of the Act or these sections;

(B) refuses to allow the department to conduct an inspection or collect samples;

(C) interferes with the department in the performance of its duties;

(D) removes or disposes of a detained drugs in violation of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.021; or

(E) fails to inform the department of any salvage warehouse(s) at the time of an inspection or when requested by the department.

(2) Prior to revoking the license, the department shall give the licensee written notice of the proposed revocation, including the reasons for the revocation and an opportunity for a hearing.

(f) License hearings.

(1) Any hearings for the denial, suspension, emergency suspension, or revocation of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to the Texas Board of Health) and the Administrative Procedure Act, Government Code, Chapter 2001.

(2) Within ten days after an emergency suspension or within 20 days after the postmark date of the department's written notice of proposed denial, suspension, or revocation, the applicant or licensee may request a hearing in writing from the department's Bureau of Food and Drug Safety. If the applicant or licensee does not request a hearing during the required time period, then the applicant or licensee is deemed to have waived his/her right to a hearing.

(g) Reinstatement of license.

(1) A person whose application for a license has been denied or whose license has been placed under an emergency suspension may request a reinspection for the purpose of granting or reinstating a license not later than the 30th day after the denial or emergency suspension. Not later than the tenth day after the receipt of a written request from the applicant or licensee, the department shall make a reinspection.

(2) As regards a nonemergency suspension or a revocation, the licensee may request at any time, an inspection for reinstating the license or for issuing a new license.

(3) If, after inspection, the department determines that the applicant or licensee meets the requirements of the Act or these sections, the department shall reinstate the license or issue a new license, as appropriate.

(4) Reinspection fee. Except as provided for in §229.576(c) of this title (relating to Licensing Fees), a salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to this section shall pay a nonrefundable inspection fee of $400.

(h) Emergency order.

(1) General. The commissioner or the commissioner's designee may issue an emergency order, either mandatory or prohibitory, concerning the sale or distribution of distressed drugs in the department's jurisdiction if the commissioner or the commissioner's designee determines that:

(A) the sale or distribution of those drugs creates or poses an immediate and serious threat to human life or health; and

(B) other procedures available to the department to remedy or prevent the threat will result in unreasonable delay.

(2) Absence of notice and hearing. The commissioner or the commissioner's designee may issue the emergency order without notice and hearing if the commissioner or the commissioner's designee determines it is necessary under the circumstances.

(3) Hearings. If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(i) Administrative penalty. If a person violates these sections, or an order adopted or license issued under the Act, the commissioner may assess an administrative penalty against the person.

(1) The penalty may not exceed $25,000 for each violation. Each day a violation continues is a separate violation.

(2) In determining the amount of the penalty, the commissioner shall consider the following criteria:

(A) the person's previous violations;

(B) the seriousness of the violation;

(C) any hazard to the health and safety of the public;

(D) the person's demonstrated good faith; and

(E) other matters as justice may require.

(3) Violations subject to this subsection shall be categorized into severity levels as determined in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties).

(4) Hearings, appeals from, and judicial review of final administrative decisions under this subsection shall be conducted according to the contested case provisions of the Government Code, Chapter 2001, and the board's formal hearing rules found in Chapter 1 of this title.

(5) An administrative penalty may be assessed only after a person charged with a violation is given an opportunity for a hearing.

(6) If a hearing is held, the commissioner shall make findings of fact and shall issue a written decision regarding the occurrence of the violation and the amount of the penalty.

(7) If the person charged with the violation does not request a hearing, the commissioner may assess a penalty after determining that a violation has occurred and the amount of the penalty.

(8) After making a determination under this subsection that a penalty is to be assessed, the commissioner shall issue an order requiring that the person pay the penalty.

(9) The commissioner may consolidate a hearing held under this subsection with another proceeding.

(10) Not later than the 30th day after the date of issuance of an order finding that a violation has occurred, the commissioner shall inform the person against whom the order is issued of the amount of the penalty.

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

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Susan Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER CC. REGULATION OF DEVICE SALVAGE ESTABLISHMENTS AND BROKERS

25 TAC §§229.601- 229.614

The new sections are proposed under Health and Safety Code, §432.011, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 432; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the

performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new sections affect Health and Safety Code, Chapter 432; and Government Code, §2001.039.

§229.601. Purpose.

These sections provide for the licensing and regulation of device salvage establishments and brokers to prevent the sale or distribution of adulterated or misbranded devices to consumers.

§229.602. Applicable Laws and Regulations.

(a) A salvage establishment or salvage broker who is subject to these sections and who is also involved in the reconditioning, sale or distribution of distressed or salvaged food, drugs, or cosmetics must comply with the applicable requirements in Subchapter AA of this chapter (relating to Regulation of Food Salvage Establishments and Brokers), Subchapter BB of this chapter (relating to Regulation of Drug Salvage Establishments and Brokers), and Subchapter DD of this chapter (relating to Regulation of Cosmetic Salvage Establishments and Brokers).

(b) The department adopts by reference the following federal laws and regulations:

(1) Fair Packaging and Labeling Act, 15 United States Code (U.S.C.), §1451 et seq., as amended;

(2) Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §301 et seq., as amended;

(3) §501(c)(3), Internal Revenue Code of 1986, as amended;

(4) 21 Code of Federal Regulations (CFR), Part 801, as amended;

(5) 21 CFR, Subchapter J, Radiological Health, as amended; and

(6) 21 CFR, Part 820, Quality System Regulation, as amended.

(c) Copies of the laws and regulations referenced in subsection (b) are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health; 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours. Electronic copies of these laws and regulations are available from the Drugs and Medical Devices Division website at http://www.tdh.state.tx.us/bfds/dmd.

(d) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable state and federal laws and regulations.

§229.603. Definitions.

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

(1) Act - The Texas Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, Chapter 432.

(2) Adulterated device - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.111.

(3) Authorized agent - an employee of the department who is designated by the commissioner to enforce the provisions of this chapter.

(4) Board - The Texas Board of Health.

(5) Change of ownership - A sole proprietor who transfers all or part of the salvage establishment or salvage broker business to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a salvage establishment or salvage broker business owned by a partnership; a corporate sale, transfer; reorganization; or merger of the corporation which owns the salvage establishment or salvage broker business if the sale, transfer, reorganization, or merger causes a change in the salvage establishment's or salvage broker business's ownership to another person or persons; or if any other type of association, the removal, addition, or substitution of a person or persons as a principal of such association.

(6) Class I exempt device - A class I device not labeled or otherwise represented as sterile that has been determined by the U.S. Food and Drug Administration to be exempt from the current good manufacturing practice requirements in 21 CFR, Part 820 (quality system regulation), except for general requirements concerning records (21 CFR, §820.180) and complaint files (21 CFR, §820.198).

(7) Class I device - A device determined by the U.S. Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, §513, to be subject to only the general controls authorized by or under §§501 (adulteration), 502 (misbranding), 510 (registration), 516 (banned devices), 518 (notification and other remedies), 519 (records and reports), and 520 (general provisions) of the Federal Food, Drug, and Cosmetic Act.

(8) Class II device - A device determined by the U.S. Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, §513, to be subject to or eventually subject to special controls, such as performance standards, postmarket surveillance, patient registries, or guidance documents.

(9) Class III device - A device determined by the U.S. Food and Drug Administration under the Federal Food, Drug, and Cosmetic Act, §513, to be subject to or eventually subject to the premarket approval requirements in the Federal Food, Drug, and Cosmetic Act, §515.

(10) Commissioner - The Commissioner of Health.

(11) Cosmetic - Any article or substance intended to be rubbed, poured, sprinkled, or sprayed on or introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering appearances; or an article or substance for use as a component of such an article, except that the term does not include soap.

(12) Department - The Texas Department of Health.

(13) Device - An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component; part, or accessory; that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(14) Device manufacturer - A person who manufactures, fabricates, assembles; or processes a finished device. The term includes

a person who repackages or relabels a finished device. The term does not include a person who only distributes a finished device.

(15) Distressed device - Any device that is adulterated or misbranded within the meaning of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §§431.111 and 431.112. The term includes a device that:

(A) has lost its labeling or is otherwise unidentified;

(B) has been subjected to prolonged or improper storage, including insanitary conditions whereby the device may have been contaminated with filth or whereby it may have been rendered injurious to health;

(C) has been subjected for any reason to abnormal environmental conditions, including temperature extremes, humidity, smoke, water, fumes, pressure, or radiation;

(D) has been subjected to conditions that result in either its strength, purity, or quality falling below that which it purports or is represented to possess; or

(E) may have been rendered unsafe or unsuitable for its intended use according to the manufacturer's recommendations or specifications; or for any reason other than those specified by this paragraph.

(16) Drug -

(A) an article or substance recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, the official National Formulary, or any supplement of them;

(B) an article or substance designed or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(C) an article or substance, other than food, intended to affect the structure or any function of the body of man or other animals; or

(D) an article or substance intended for use as a component of any article or substance specified in this definition.

(17) Finished device - A device, or any accessory to a device, which is suitable for use, whether or not packaged or labeled for commercial distribution.

(18) Flea market - A location at which booths or similar spaces are rented or otherwise made available temporarily to two or more persons and at which the persons offer tangible personal property for sale.

(19) Food -

(A) any article of food or drink for man;

(B) chewing gum; or

(C) an article used for components of any such article.

(20) Labeling - All labels and other written, printed, or graphic matter:

(A) upon any article or any of its containers or wrappers; or

(B) accompanying such article.

(21) Misbranded device - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.112.

(22) Nonprofit organization - An organization that has received an exemption from federal taxation under 26 U.S.C., §501(c)(3).

(23) Nonsalvageable device - a distressed device, as defined in this section, which cannot be safely or practically reconditioned.

(24) Person - Includes individual, partnership, corporation, and association.

(25) Personnel - Any person employed by a salvage establishment or salvage broker who does or may in any manner handle or come in contact with the handling; storing; transporting; or selling and distributing of salvageable or salvaged devices.

(26) Place of business - Each location from which a salvage establishment or salvage broker operates. The term does not include a salvage warehouse.

(27) Practitioner - A person licensed by the Texas State Board of Medical Examiners, State Board of Dental Examiners, Texas State Board of Podiatric Medical Examiners, Texas Optometry Board, or State Board of Veterinary Medical Examiners to prescribe and administer prescription devices.

(28) Prescription device - A device which, because of any potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use is not safe except under the supervision of a practitioner licensed by law to direct the use of such device, and hence for which adequate directions for use cannot be prepared.

(29) Quality audit - An independent examination of a salvage establishment, including the organizational structure and responsibilities, procedures, and processes necessary to ensure that such resources and activities comply with the requirements of these sections and result in the adequate reconditioning of a distressed device.

(30) Reconditioning - Any appropriate process or procedure by which a distressed device can be brought into compliance with the standards of the department for use by the public. In addition, all reconditioned devices must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(31) Sale or distribution - The act of selling or distributing, whether for compensation or not; and includes delivery; holding; or offering for sale; transfer, auction; storage; or other means of handling or trafficking.

(32) Salvage broker - A person who engages in the business of selling, distributing, or otherwise trafficking in any distressed or salvaged food, drug, device, or cosmetic and who does not operate a salvage establishment.

(33) Salvage establishment - Any place of business engaged in reconditioning or by other means salvaging distressed food, drugs, devices, or cosmetics, or that sells, buys, or distributes for human use any salvaged food, drug, device, or cosmetic.

(34) Salvage operator - A person who is engaged in the business of operating a salvage establishment.

(35) Salvage warehouse - A separate storage facility used by a salvage broker or salvage establishment for the purpose of holding distressed or salvaged devices.

(36) Salvageable device - Any distressed device, as defined in this section, which can be reconditioned to departmental standards.

(37) Salvaged device - Any distressed device that has been reconditioned.

(38) Vehicle - Any truck, car, bus, or other means by which distressed, salvageable, or salvaged devices are transported from one location to another.

§229.604. Exemptions and Applicability.

(a) A person is exempt from licensing under these sections if the person is:

(1) a manufacturer or distributor of a device who in the normal course of business engages in the activities of reconditioning the device manufactured or distributed by or for that person and not purchased by that person solely for the purpose of reconditioning and sale;

(2) a person who is a common carrier or the common carrier's agent, who disposes of or otherwise transfers an undamaged or distressed device to a person who is exempt under this section or to a licensed salvage broker or salvage operator; or

(3) a person who transfers a distressed device to a licensed salvage broker or salvage operator.

(b) An exemption from the licensing requirements under these sections does not constitute an exemption from other applicable provisions of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431 or the rules adopted to administer and enforce the Act.

(c) A salvage establishment or salvage broker who is engaging in conduct within the scope of the license issued under §229.605 of this title (relating to Licensing Requirements and Procedures) is not required to also be licensed under Health and Safety Code, Chapter 431. An exemption from the licensing requirements under Health and Safety Code, Chapter 431, does not constitute an exemption from other applicable provisions of Health and Safety Code, Chapter 431, or the rules adopted to administer and enforce the chapter.

(d) These sections do not apply to the sale or distribution of previously used devices that are not distressed devices and have been determined to function properly and meet manufacturer's performance specifications. Acceptable determinations of functionality shall include certification statements; reports of inspection, installation, or calibration; and product conformance affidavits. All certification statements, reports, and conformance affidavits shall be completed, signed and dated no more than 14 days prior to the time of sale or distribution by a qualified representative of the seller, a person licensed under these sections, or a state or federal regulatory agency having knowledge or jurisdiction over the devices subject to any sale or distribution.

§229.605. Licensing Requirements and Procedures.

(a) General. Except as provided by §229.604(a) of this title (relating to Exemptions and Applicability), it shall be unlawful for any person to operate a salvage establishment or act as a salvage broker within this state, who does not possess a current and valid license issued by the department.

(b) Licensing of out-of-state salvage establishments and brokers. A person who operates a salvage establishment or acts as a salvage broker outside this state may not sell, distribute, or otherwise traffic in distressed or salvaged food, drugs, devices, or cosmetics within this state unless the person holds a license from the department.

(c) Reports from other jurisdictions. The department may accept reports from authorities in other jurisdictions to determine the extent of compliance with these sections and with the provisions of the Act.

(d) New place of business. Each person acquiring or establishing a place of business for the purpose of operating a salvage establishment or operating as a salvage broker shall apply for and obtain a license of such business prior to beginning operation.

(e) Two or more places of business. If the salvage establishment or salvage broker operates more than one place of business, the salvage establishment or salvage broker shall license each place of business separately.

(f) License application. License application forms may be obtained from the Texas Department of Health, Licensing and Enforcement Division, 1100 W. 49th Street, Austin, Texas 78756 or from the Bureau of Food and Drug Safety website at http://www.tdh.state.tx.us/bfds/lic/apps.html.

(g) Contents of initial license application. The initial application for licensing as a salvage establishment or salvage broker shall be signed and verified, shall be made on a license application form furnished by the department, and shall include the following information:

(1) the legal name under which the business is conducted;

(2) the address of the place of business to be licensed and the mailing address or billing address if different;

(3) the name, residence address, and driver's license number of the responsible individual in charge at the place of business;

(4) the hours of operation of each place of business;

(5) the address of any salvage warehouse used by a salvage establishment or salvage broker;

(6) if a proprietorship, the name and residence address of the proprietor; if a partnership, the names and residence addresses of all partners; if a corporation, the date and place of incorporation and name and address of its registered agent in the state and corporation charter number; or if any other type of association, then the names of the principals of such association; and

(7) a statement signed and verified by the sole proprietor, managing partner, corporate officer, or person in a managerial capacity for an association that acknowledges the applicant has read, understood, and agrees to abide by the provisions of these sections and those of the Act.

(h) Issuance of license. In accordance with §229.281 of this title (Processing Permit Applications Relating to Food and Drug Operations), the department may license a salvage establishment or salvage broker who meets the requirements of these sections.

(i) Transfer of license. Licenses shall not be transferable from one person to another or from one place of business to another.

(j) Display of license. The license shall be displayed in an open public area at each place of business and each salvage operator shall have a copy of a valid license in each vehicle used by the salvage operator to transport distressed devices.

(k) License expiration. Unless the department revokes or suspends a license as provided in §229.614 of this title (relating to Enforcement and Penalties), the initial license shall be valid for one year from the date of issuance which becomes the anniversary date.

(l) Renewal of license.

(1) Each year prior to the anniversary date, the salvage establishment or salvage broker shall renew its license following the requirements of this section.

(2) The renewal license shall be valid for one year from the anniversary date.

(3) The license renewal application and nonrefundable renewal fee for each place of business shall be submitted to the department prior to the expiration date of the current license in accordance

with the procedures in this section. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(4) The department shall renew the license of a licensee who submits a renewal application and pays the renewal fee after finding that the licensee is in compliance with these sections as determined by an inspection of the licensee's place of business or as outlined in subsection (c) of this section.

(5) Renewal license application. The renewal application for licensing as a salvage establishment or salvage broker shall be made on a license application form furnished by the department and can be obtained as referenced in subsection (f) of this section.

(m) Completeness of license applications. Failure to complete the initial or renewal license application form may result in the denial of a license.

(n) Report of changes. The license holder shall notify the department in writing within ten days of any change, including a change in location, name or ownership of a salvage establishment or salvage broker, which would render the information contained in the initial license application no longer accurate. Failure to inform the department within ten days of a change in the information required in the initial license application may result in enforcement action as described in §229.614 of this title.

(o) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of an application as outlined in subsection (g) of this section and submission of fees as outlined in §229.606 of this title (relating to Licensing Fees).

(p) Return of license. A license issued under these sections shall be returned to the department if the place of business:

(1) ceases business or otherwise ceases operation on a permanent basis;

(2) relocates;

(3) changes the name of the business under which the salvage establishment or salvage broker operates; or

(4) changes ownership.

§229.606. Licensing Fees.

(a) Licensing fees.

(1) Annual fee. All salvage establishments and salvage brokers operating in Texas shall obtain a license annually from the department and shall pay a nonrefundable fee for each place of business.

(A) Except as provided for in subparagraph (B) of this paragraph, salvage establishments and salvage brokers shall pay a nonrefundable annual licensing fee of $400.

(B) A salvage establishment or salvage broker that engages in the business of reconditioning, selling, distributing, or otherwise trafficking in distressed or salvaged devices shall pay a nonrefundable annual licensing fee of $550.

(2) Delinquency fee. A salvage establishment or salvage broker must pay a $100 delinquency fee if:

(A) the renewal license application is submitted or the renewal license fee is paid after the expiration date of the current license; or

(B) the initial license application is submitted or the initial license fee is paid more than 30 days following the effective date of a change in location, name, or ownership of an existing salvage establishment or salvage broker as described in §229.605(o) of this title (relating to Licensing Requirements and Procedures).

(3) Reinspection fee. A salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to §229.614 of this title (relating to Enforcement and Penalties), shall pay a nonrefundable inspection fee of $400.

(b) Consolidation of multiple anniversary dates. The department may, upon receipt of a written request from a license holder, prorate an annual license fee for the purpose of consolidating the anniversary dates of multiple licenses issued in the name of the license holder.

(c) Exemption from licensing fees. A person is exempt from the licensing fees required by this section if the person is a nonprofit organization, as described in the Internal Revenue Code of 1986, §501(c)(3), as amended, or a nonprofit affiliate of the organization, to the extent otherwise permitted by law.

§229.607. Personnel.

(a) Employee health requirements. No person known to be or suspected of being affected with any disease in a communicable form, or while a carrier of such disease, or while afflicted with boils, infected wounds, sores, or respiratory infection, shall work in an area of a salvage establishment or for a salvage broker in any capacity in which there is any possibility of such person contaminating salvageable or salvaged devices with pathogenic organisms, or transmitting disease to other individuals.

(b) Personal cleanliness.

(1) All personnel while working in direct contact with salvageable devices or while engaged in reconditioning, repacking, or otherwise handling any components or accessories of salvageable devices shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

(2) Personnel engaged in reconditioning salvageable devices shall wash their hands thoroughly in a department approved handwashing facility before starting work, and as often as may be necessary to remove soil and contamination.

(3) No person shall resume work after visiting the toilet room without first washing their hands.

§229.608. Construction and Maintenance of Physical Facilities.

(a) Buildings. Buildings used by salvage establishments and salvage brokers shall be of suitable design and contain sufficient space to perform necessary operations, prevent mix-ups, and assure orderly handling.

(b) Floor construction.

(1) The floor surfaces in all rooms and areas in which salvageable or salvaged devices are stored or processed and in which tools or equipment are washed, and walk-in refrigerators, dressing or locker rooms and toilet rooms, shall be constructed to be smooth and easily cleanable.

(2) Any floor that is exposed to water or liquids shall be constructed and maintained to be nonabsorbent.

(3) All floors shall be kept clean and in good repair.

(4) Floor drains shall be provided in all rooms where floors are subjected to flooding-type cleaning or where normal operations release or discharge water or other liquid waste on the floor.

(c) Walls and ceilings. Walls and ceilings of all rooms shall be clean, smooth, and in good repair.

(d) Lighting. Adequate lighting shall be provided in hand-washing areas, dressing and locker rooms, and toilet rooms and in all areas where salvageable or salvaged devices are examined, processed, or stored and where equipment or tools are cleaned.

(1) Where personnel are inspecting, sorting, or reconditioning distressed devices, at least 540 lux (50 foot candles) of light shall be provided at the work surface.

(2) At all other areas of the facility where light is required, at least 110 lux (ten foot candles) of light shall be provided when measured at a distance of 30 inches above the floor.

(e) Ventilation.

(1) All rooms, in which salvageable or salvaged devices are reconditioned or tools or equipment are washed, dressing or locker rooms, toilet rooms, and garbage and refuse storage areas shall be well ventilated.

(2) Ventilation hoods and related equipment when used shall be designed to prevent condensation from dripping onto salvageable devices or onto work surfaces.

(3) Filters, when used, shall be readily removable for cleaning or replacement.

(4) Ventilation systems shall comply with applicable federal, state, and local fire prevention and air pollution requirements.

(f) Locker area. Adequate facilities shall be provided for the orderly storage of personnel clothing and personal belongings.

(g) Cleanliness of facilities.

(1) All parts of the salvage establishment or salvage warehouse and its premises shall be kept neat, clean, and free of litter and refuse.

(2) Cleaning operations shall be conducted in such a manner as to prevent contamination of salvageable and salvaged devices.

(3) None of the operations connected with a salvage establishment or salvage warehouse shall be conducted in any room used as a personnel lounge or toilet facility, or living or sleeping quarters.

(4) Soiled coats and aprons shall be kept in suitable containers until removed for laundering.

(5) No birds or animals shall be allowed in any areas used for the conduct of salvage establishment operations or the storage of salvageable and salvaged devices, except that guide dogs accompanying blind persons shall be permitted in sales areas.

(h) Vehicles. Vehicles used to transport distressed, salvageable, or salvaged devices shall be maintained in a clean and sanitary condition to protect the product from contamination.

§229.609. Sanitary Facilities and Controls.

(a) Water supply. The water supply shall be adequate, of a safe, sanitary quality, and from a source constructed and operated in accordance with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(b) Sewage. All sewage, including liquid waste, shall be disposed of in a public sewerage system or, in the absence thereof, in a manner applicable with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(c) Plumbing. Plumbing shall be sized, installed, and maintained in accordance with applicable state and local plumbing codes.

(d) Toilet facilities.

(1) Each salvage establishment shall provide its personnel with adequate and conveniently located toilet facilities.

(2) Toilet facilities, including rooms and fixtures, shall be kept in a clean condition and in good repair at all times.

(3) The doors of all toilet rooms shall be self-closing.

(4) Toilet tissue shall be provided.

(5) Easily cleanable receptacles shall be provided for waste materials, and such receptacles in toilet rooms for women shall be covered.

(6) Where the use of non-water-carried sewage disposal facilities are approved by the department they shall be located at least 100 linear feet from the salvage establishment and from any well or stream.

(e) Hand-washing facilities. Each salvage establishment shall be provided with adequate, conveniently located hand-washing facilities for its personnel, including a lavatory or lavatories equipped with hot and cold or tempered running water, hand-cleansing soap or detergent, and approved sanitary towels or other approved hand-drying devices. Such facilities shall be kept clean and in good repair.

(f) Garbage and refuse.

(1) All organic or organic-containing refuse shall be kept in leak proof, non-absorbent containers which shall be kept covered with tight-fitting lids when filled or stored, or not in continuous use. Such containers shall be covered when stored and stored in either a vermin-proof room or enclosure or in a waste refrigerator. Paper, cardboard, unused equipment, and non-organic refuse shall be stored in containers, rooms, or areas in such a manner to prevent it from becoming a source of contamination or pest harborage.

(2) Adequate cleaning facilities shall be provided, and each container, room, or area shall be thoroughly cleaned after the emptying or removal of refuse.

(3) All refuse shall be disposed of with sufficient frequency and in such a manner as to prevent contamination.

(4) All refuse shall be disposed of in accordance with all applicable state and local requirements, including requirements for solid waste disposal as referenced in Title 30, Texas Administrative Code, Chapters 330, 335, and 336.

(g) Insect and rodent control. Effective measures shall be taken to protect against the entrance into the salvage establishment or salvage warehouse, and the breeding or presence on the premises of rodents, insects, and other vermin.

§229.610. General Provisions for Handling and Movement of Distressed Devices.

(a) Notice to the department.

(1) When the source of distressed devices is the result of a natural disaster, accident, power failure, or other emergency, the salvage establishment or salvage broker shall make contact with the department's Bureau of Food and Drug Safety within 24 hours after their initial awareness of the emergency and prior to any removal of distressed devices from the place at which it was located when it became distressed.

(2) If emergency removal of distressed devices referenced in subsection (a)(1) is required, notice to the department shall be made as soon thereafter as possible. It shall be the duty of the salvage establishment or salvage broker to make contact with the department's

Bureau of Food and Drug Safety within 48 hours whenever distressed devices subject to the provisions of this subsection are obtained.

(3) Distressed devices referenced in subsection (a)(1) shall not be moved out of the State of Texas without the prior approval of the department and the responsible state agency in the state to receive the devices. Concurrence shall also be obtained from the U.S. Food and Drug Administration prior to interstate movement.

(b) Protection of salvageable and salvaged devices.

(1) All salvageable and salvaged devices stored by salvage establishments or salvage brokers shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such devices.

(2) All salvageable and salvaged devices, while being stored or processed at a salvage establishment, salvage warehouse, or during transportation, shall be protected from contamination.

(3) Poisonous and toxic materials shall be identified and handled under such conditions as will not contaminate other salvageable or salvaged devices, or constitute a hazard to personnel.

(c) Segregation of devices. All salvageable devices shall be promptly sorted and segregated from nonsalvageable devices to prevent further contamination of the distressed devices to be salvaged or offered for sale or distribution.

(d) Nonsalvageable devices.

(1) Containers, including metal and glass containers with press caps, screw caps, pull rings, or other types of openings which have been in contact with nonpotable water, liquid foam, or other deleterious substances, as a result of fire fighting efforts, flood, sewer backups, or similar mishaps, shall be deemed unfit for sale or distribution, i.e., nonsalvageable devices as defined in §229.603(23) of this title (relating to Definitions).

(2) Nonsalvageable devices shall be disposed of as in §229.609(f)(4) of this title (relating to Sanitary Facilities and Controls) or §229.611(o) of this title (relating to Reconditioning Distressed Devices); or by delivery to a waste reclamation (recycling) facility for destruction.

(3) Distressed devices which are deemed to be nonsalvageable by a duly authorized agent of the department shall, at the request of the agent, be destroyed under the supervision of that agent at the expense of the owner.

(e) Transporting of distressed devices.

(1) Distressed devices shall be moved from the site of a fire, flood, sewer backup, wreck, or other cause as expeditiously as possible after compliance with subsection (a) of this section, if applicable, so as not to become hazardous to public health.

(2) All distressed devices of a temperature sensitive nature shall, prior to reconditioning, be transported only in vehicles capable of maintaining adequate temperatures, if necessary, for product integrity.

(f) Handling of distressed articles other than devices. If distressed articles other than devices are also salvaged, they shall be handled separately so as to prevent contamination from poisonous and toxic materials or other contaminants.

(g) Cross-contamination protection. Sufficient precautions shall be taken to prevent cross-contamination among the various types of devices that are salvageable or salvaged.

§229.611. Reconditioning Distressed Devices.

(a) Salvageable devices. All salvageable devices shall be reconditioned prior to sale or distribution except for such sale or distribution to a person holding a valid license to engage in a salvage operation or as provided for in subsection (o) of this section.

(b) Reconditioned devices. All reconditioned devices must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(c) General labeling. All salvaged devices must be labeled in accordance with the requirements of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431; the Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §301 et seq., as amended; the Fair Packaging and Labeling Act, 15 U.S.C., §1451 et seq., as amended; and the federal regulations promulgated under those Acts.

(d) Reconditioned Labeling. In addition to the general labeling requirements found in subsection (c) of this section, all reconditioned devices shall be labeled with the statement "Reconditioned by (name and business address of the salvage establishment responsible for the reconditioning of the device)."

(e) Salvage warehouses. A person may not use a salvage warehouse to recondition devices or sell to consumers.

(f) Personnel. Each salvage establishment that engages in the reconditioning of devices shall have sufficient personnel with the necessary education, background, training, and experience to assure that all reconditioning activities are correctly performed. With the exception of class I exempt devices, training of personnel engaged in the reconditioning of class I, II, or III devices shall be documented.

(g) Operating procedures. Each salvage establishment that engages in the reconditioning of devices shall establish, maintain, and implement written procedures for identifying devices during all stages of receipt, reconditioning, distribution, and installation to prevent mixups.

(h) Inspection, measuring, and test equipment.

(1) Each salvage establishment that engages in the reconditioning of devices shall ensure that all inspection, measuring, and test equipment used in the reconditioning of devices is:

(A) suitable for its intended purpose and capable of producing valid results; and

(B) routinely calibrated, inspected, checked, and maintained.

(2) Each salvage establishment that engages in the reconditioning of class II and III devices shall establish and maintain calibration records for inspection, measuring, and test equipment to include:

(A) the equipment identification;

(B) dates of calibration;

(C) the person performing each calibration; and

(D) the next scheduled calibration date.

(i) Device history record. With the exception of class I exempt devices, each salvage establishment that engages in the reconditioning of class I, II, or III devices shall establish and maintain a device history record for each batch, lot, or unit reconditioned to ensure that devices are reconditioned in accordance with manufacturer's specifications. The device history record shall include the following information:

(1) the dates of reconditioning;

(2) the quantity reconditioned;

(3) the quantity released for distribution;

(4) the acceptance records which demonstrate the device is reconditioned in accordance with the device master record;

(5) copies of any labeling required by these sections; and

(6) any device identification or control number used.

(j) Device master record. Each salvage establishment that engages in the reconditioning of class II or III devices shall establish and maintain device master records for each type of class II or III device reconditioned. The device master record shall include, or refer to the location of, the following information:

(1) device specifications, including appropriate drawings, composition, formulation, component specifications, and software specifications;

(2) reconditioning process specifications, including the appropriate equipment specifications, reconditioning methods, reconditioning procedures, and reconditioning environment specifications;

(3) final acceptance procedures and specifications, including acceptance criteria and the inspection, measuring, and test equipment to be used;

(4) packaging and labeling specifications, including methods and processes used; and

(5) installation, maintenance, and servicing procedures and methods.

(k) Complaint files. Each salvage establishment and salvage broker that engages in the reconditioning or distribution of distressed or salvaged devices shall establish and maintain complaint files. Any complaint involving the possible failure of a device, labeling, or packaging to meet any of its specifications shall be reviewed, evaluated, and investigated. All records of investigation shall include:

(1) the name of the device;

(2) the date the complaint was received;

(3) any device identification(s) and control number(s) used;

(4) the name, address, and phone number of the complainant;

(5) whether the complaint is associated with any illness or injury involving the device;

(6) the nature and details of the complaint;

(7) the dates and results of the investigation;

(8) any corrective action taken;

(9) any reply to the complainant; and

(10) the name and signature of the person formally designated by the salvage establishment or salvage broker as responsible for investigating all complaints.

(l) Internal audits. Each salvage establishment that engages in the reconditioning of class II or III devices shall establish, maintain, and implement written procedures for conducting an internal quality audit and shall conduct such an audit at least annually. The dates and results of the audit shall be documented, including any deficiencies found and the corrective action taken to address the deficiencies.

(m) Corrective and preventative action. Each salvage establishment that engages in the reconditioning of class II or III devices shall document any action taken by the salvage establishment to correct or prevent any nonconformities relating to a salvaged class II or III device or to the reconditioning of a class II or III device.

(n) Device remanufacturers. Those salvage establishments who are also device remanufacturers shall comply with these sections and with the device manufacturer requirements in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, Subchapter L, including the applicable requirements in 21 CFR, Part 820 (quality system regulation).

(o) Sale or distribution of unreconditioned devices. With the exception of prescription devices, salvageable devices need not be reconditioned in accordance with this section prior to sale or distribution if such devices are to be used solely for non-medical purposes (e.g. research, teaching, or analysis) and not introduced into commercial distribution for use on man or other animals, provided these conditions of sale or distribution are disclosed to the purchaser in writing. At a minimum, all written disclosure records shall include the identity of any device, a statement regarding the conditions of sale or distribution that is signed by both the seller and purchaser, and the address and telephone number of both the seller and purchaser. These written disclosure records shall be retained as required in §229.612(b) of this title (relating to Records).

(p) Sale or distribution of prescription devices.

(1) A prescription device in the possession of a salvage establishment or salvage broker licensed under these sections of this subchapter is exempt from Health and Safety Code, §431.112(f)(1), relating to labeling bearing adequate directions for use, providing it meets the requirements of 21 CFR, §801.109 (prescription devices) and 21 CFR, §801.110 (retail exemption for prescription devices).

(2) Each salvage establishment or salvage broker who sells or distributes a prescription device shall establish and maintain a record for every prescription device, showing the identity and quantity received, date of receipt, and the disposition of each device.

(3) Each salvage establishment or salvage broker who delivers a prescription device to the ultimate user shall maintain a record of any prescription or other order lawfully issued by a practitioner in connection with the device.

(q) Sale of contact lenses at flea markets. Persons at flea markets may not sell contact lens devices unless:

(1) the person selling the contact lenses has complied with the requirements of Business and Commerce Code, §35.55; and

(2) the person selling the contact lenses has complied with the requirements of the Texas Contact Lens Prescription Act, Texas Civil Statutes, Article 4552-A.

§229.612. Records.

(a) Inventory Records. A written record or receipt of all distressed, salvageable, and salvaged devices shall be maintained by the salvage establishment or salvage broker and shall include:

(1) the common name, the brand name or manufacturer, and quantity of the device received;

(2) the source of the distressed device;

(3) the date received;

(4) a brief description of the type or cause of damage (fire, flood, wreck, prolonged storage, warehouse damage, etc.);

(5) the name of the individual or business that purchases any such device for the purpose of sale or distribution and the date of any such transaction; and

(6) the date and final disposition of the device (reconditioned, unreconditioned, destroyed, etc.).

(b) Retention of records. All records required in these sections shall be kept at the place of business of the salvage establishment or salvage broker for a period of two years following the completion of any transaction involving a device.

(c) Electronic records. Records required by these sections which are maintained by the salvage establishment or salvage broker on computer systems shall be regularly copied, at least monthly, and updated on storage media other than the hard drive of the computer. An electronic record must be retrievable as a printed copy.

§229.613. Inspection.

(a) Inspection. To enforce these sections or the Act, the commissioner or an authorized agent may, on presenting appropriate credentials to the owner, operator, or agent in charge of a place of business:

(1) enter at reasonable times the place of business of a salvage establishment or salvage broker;

(2) enter a salvage warehouse used to store or hold distressed or salvaged devices;

(3) enter a vehicle being used to transport or hold distressed or salvaged devices; or

(4) inspect at reasonable times, any place of business of a salvage establishment or salvage broker, salvage warehouse, or vehicle and all equipment, finished and unfinished materials, containers, and labeling of any item and obtain samples necessary for the enforcement of these sections or the Act.

(b) Access to required records. A person who is required to maintain records referenced in these sections or under the Act or a person who is in charge or custody of those records shall, at the request of the commissioner or an authorized agent, permit the commissioner or authorized agent at all reasonable times access to review, copy, and verify the records.

(c) Access to records showing movement in commerce. A person who is subject to licensing under §229.605 of this title (relating to Licensing Requirements and Procedures) or a person, including a common carrier or the common carrier's agent, who disposes of or otherwise transfers distressed or salvaged devices shall, at the request of the commissioner or an authorized agent, permit the commissioner or authorized agent at all reasonable times access to review, copy, and verify all records showing:

(1) the movement in commerce of any distressed or salvaged device;

(2) the holding of any distressed or salvaged device after movement in commerce; and

(3) the quantity, shipper, and consignee of any distressed or salvaged device.

(d) Receipt for samples. The commissioner or an authorized agent who makes an inspection of a place of business, including any vehicle or salvage warehouse, and obtains a sample during or on completion of the inspection and before leaving the place of business, shall give to the owner, operator, or the owner's or operator's agent a receipt describing the sample.

(e) Detained or embargoed device. In accordance with Subchapter C, Chapter 431, the commissioner or an authorized agent may detain or embargo a distressed device that is in the possession of a person operating as a salvage establishment or acting as a salvage broker. The commissioner or authorized agent may not detain a distressed device in the possession of a person licensed under §229.605 of this title and that is being held for the purpose of reconditioning unless the commissioner or authorized agent finds or has probable cause to believe that the device cannot be adequately reconditioned in accordance with the chapter and these sections.

§229.614. Enforcement and Penalties.

(a) General license actions. The department may deny, suspend, or revoke the license of an applicant or licensee who fails to comply with the Act or these sections.

(b) License denials.

(1) The department may deny an application for a license if the applicant fails to meet the standards or requirements of the Act or these sections.

(2) The department shall give the applicant written notice of the denial, the reasons for the denial, and opportunity for a hearing.

(c) Emergency license suspensions.

(1) The department may suspend a license without notice when there is an imminent threat to the health and safety of the public.

(2) If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(d) Nonemergency license suspensions.

(1) The department may suspend a license when the licensee violates any one of the following requirements:

(A) failure to comply with the Act or these sections; or

(B) falsification of information provided in an application for a license.

(2) The department shall give the licensee written notice of the proposed suspension, including the reasons for the suspension and an opportunity for a hearing.

(e) License revocations.

(1) The department may revoke a license when the licensee:

(A) violates the provisions of the Act or these sections;

(B) refuses to allow the department to conduct an inspection or collect samples;

(C) interferes with the department in the performance of its duties;

(D) removes or disposes of a detained device in violation of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.021; or

(E) fails to inform the department of any salvage warehouse(s) at the time of an inspection or when requested by the department.

(2) Prior to revoking the license, the department shall give the licensee written notice of the proposed revocation, including the reasons for the revocation and an opportunity for a hearing.

(f) License hearings.

(1) Any hearings for the denial, suspension, emergency suspension, or revocation of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to the Texas Board of Health) and the Administrative Procedure Act, Government Code, Chapter 2001.

(2) Within ten days after an emergency suspension or within 20 days after the postmark date of the department's written notice of proposed denial, suspension, or revocation, the applicant or licensee may request a hearing in writing from the department's Bureau of Food and Drug Safety. If the applicant or licensee does not request a hearing during the required time period, then the applicant or licensee is deemed to have waived his/her right to a hearing.

(g) Reinstatement of license.

(1) A person whose application for a license has been denied or whose license has been placed under an emergency suspension may request a reinspection for the purpose of granting or reinstating a license not later than the 30th day after the denial or emergency suspension. Not later than the tenth day after the receipt of a written request from the applicant or licensee, the department shall make a reinspection.

(2) As regards a nonemergency suspension or a revocation, the licensee may request at any time, an inspection for reinstating the license or for issuing a new license.

(3) If, after inspection, the department determines that the applicant or licensee meets the requirements of the Act or these sections, the department shall reinstate the license or issue a new license, as appropriate.

(4) Reinspection fee. Except as provided for in §229.606(c) of this title (relating to Licensing Fees), a salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to this section shall pay a nonrefundable inspection fee of $400.

(h) Emergency order.

(1) General. The commissioner or the commissioner's designee may issue an emergency order, either mandatory or prohibitory, concerning the sale or distribution of distressed devices in the department's jurisdiction if the commissioner or the commissioner's designee determines that:

(A) the sale or distribution of those devices creates or poses an immediate and serious threat to human life or health; and

(B) other procedures available to the department to remedy or prevent the threat will result in unreasonable delay.

(2) Absence of notice and hearing. The commissioner or the commissioner's designee may issue the emergency order without notice and hearing if the commissioner or the commissioner's designee determines it is necessary under the circumstances.

(3) Hearings. If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(i) Administrative penalty. If a person violates these sections, or an order adopted or license issued under the Act, the commissioner may assess an administrative penalty against the person.

(1) The penalty may not exceed $25,000 for each violation. Each day a violation continues is a separate violation.

(2) In determining the amount of the penalty, the commissioner shall consider the following criteria:

(A) the person's previous violations;

(B) the seriousness of the violation;

(C) any hazard to the health and safety of the public;

(D) the person's demonstrated good faith; and

(E) other matters as justice may require.

(3) Violations subject to this subsection shall be categorized into severity levels as determined in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties).

(4) Hearings, appeals from, and judicial review of final administrative decisions under this subsection shall be conducted according to the contested case provisions of the Government Code, Chapter 2001, and the board's formal hearing rules found in Chapter 1 of this title.

(5) An administrative penalty may be assessed only after a person charged with a violation is given an opportunity for a hearing.

(6) If a hearing is held, the commissioner shall make findings of fact and shall issue a written decision regarding the occurrence of the violation and the amount of the penalty.

(7) If the person charged with the violation does not request a hearing, the commissioner may assess a penalty after determining that a violation has occurred and the amount of the penalty.

(8) After making a determination under this subsection that a penalty is to be assessed, the commissioner shall issue an order requiring that the person pay the penalty.

(9) The commissioner may consolidate a hearing held under this subsection with another proceeding.

(10) Not later than the 30th day after the date of issuance of an order finding that a violation has occurred, the commissioner shall inform the person against whom the order is issued of the amount of the penalty.

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

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Susan Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER DD. REGULATION OF COSMETIC SALVAGE ESTABLISHMENTS AND BROKERS

25 TAC §§229.631- 229.644

The new sections are proposed under Health and Safety Code, §432.011, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of Chapter 432; and §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new sections affect Health and Safety Code, Chapter 432; and Government Code, §2001.039.

§229.631. Purpose.

These sections provide for the licensing and regulation of cosmetic salvage establishments and brokers to prevent the sale or distribution of adulterated or misbranded cosmetics to consumers.

§229.632. Applicable Laws and Regulations.

(a) A salvage establishment or salvage broker who is subject to these sections and who is also involved in the reconditioning, sale or distribution of distressed or salvaged food, drugs, or devices must comply with the applicable requirements in Subchapter AA of this chapter (relating to Regulation of Food Salvage Establishments and Brokers), Subchapter BB of this chapter (relating to Regulation of Drug Salvage Establishments and Brokers), and Subchapter CC of this chapter (relating to Regulation of Device Salvage Establishments and Brokers).

(b) The department adopts by reference the following federal laws and regulations:

(1) Fair Packaging and Labeling Act, 15 United States Code (U.S.C.), §1451 et seq. as amended;

(2) Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §301 et seq. as amended;

(3) §501(c)(3), Internal Revenue Code of 1986, as amended;

(4) 21 Code of Federal Regulations (CFR), Parts 701 & 740, as amended;

(c) Copies of the laws and regulations referenced in subsection (b) are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health; 1100 West 49th Street, Austin, Texas 78756, and are available for inspection during normal working hours. Electronic copies of these laws and regulations are available from the Drugs and Medical Devices Division website at http://www.tdh.state.tx.us/bfds/dmd.

(d) Nothing in these sections shall relieve any person of the responsibility for compliance with other applicable state and federal laws and regulations.

§229.633. Definitions.

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

(1) Act - The Texas Food, Drug, Device, and Cosmetic Salvage Act, Health and Safety Code, Chapter 432.

(2) Adulterated cosmetic - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.141.

(3) Authorized agent - an employee of the department who is designated by the commissioner to enforce the provisions of this chapter.

(4) Board - The Texas Board of Health.

(5) Change of ownership - A sole proprietor who transfers all or part of the salvage establishment or salvage broker business to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a salvage establishment or salvage broker business owned by a partnership; a corporate sale, transfer; reorganization; or merger of the corporation which owns the salvage establishment or salvage broker business if the sale, transfer, reorganization, or merger causes a change in the salvage establishment's or salvage broker business's ownership to another person or persons; or if any other type of association, the removal, addition, or substitution of a person or persons as a principal of such association.

(6) Commissioner - The Commissioner of Health.

(7) Cosmetic - Any article or substance intended to be rubbed, poured, sprinkled, or sprayed on or introduced into, or otherwise applied to the human body for cleansing, beautifying, promoting attractiveness, or altering appearances; or an article or substance for use as a component of such an article, except that the term does not include soap.

(8) Cosmetic manufacturer - Includes a person who represents himself as responsible for the purity and proper labeling of a cosmetic.

(9) Department - The Texas Department of Health.

(10) Device - An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component; part, or accessory; that is:

(A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it;

(B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or

(C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes.

(11) Distressed cosmetic - Any cosmetic that is adulterated or misbranded within the meaning of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §§431.141 and 431.142. The term includes a cosmetic that:

(A) has lost its labeling or is otherwise unidentified;

(B) has been subjected to prolonged or improper storage, including insanitary conditions whereby the cosmetic may have been contaminated with filth or whereby it may have been rendered injurious to health;

(C) has been subjected for any reason to abnormal environmental conditions, including temperature extremes, humidity, smoke, water, fumes, pressure, or radiation;

(D) has been subjected to conditions that result in either its strength, purity, or quality falling below that which it purports or is represented to possess; or

(E) may have been rendered unsafe or unsuitable for its intended use according to the manufacturer's recommendations or specifications; or for any reason other than those specified by this paragraph.

(12) Drug -

(A) an article or substance recognized in the official United States Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, the official National Formulary, or any supplement of them;

(B) an article or substance designed or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(C) an article or substance, other than food, intended to affect the structure or any function of the body of man or other animals; or

(D) an article or substance intended for use as a component of any article or substance specified in this definition.

(13) Food -

(A) any article of food or drink for man;

(B) chewing gum; or

(C) an article used for components of any such article.

(14) Labeling - All labels and other written, printed, or graphic matter:

(A) upon any article or any of its containers or wrappers; or

(B) accompanying such article.

(15) Manufacture - The combining, preparing, propagation, compounding, purifying, processing, packing, repacking, wrapping, and labeling of cosmetics.

(16) Misbranded cosmetic - Has the meaning specified in the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, §431.142.

(17) Nonprofit organization - An organization that has received an exemption from federal taxation under 26 U.S.C., §501(c)(3).

(18) Nonsalvageable cosmetic - a distressed cosmetic, as defined in this section; which cannot be safely or practically reconditioned.

(19) Person - Includes individual, partnership, corporation, and association.

(20) Personnel - Any person employed by a salvage establishment or salvage broker who does or may in any manner handle or come in contact with the handling; storing; transporting; or selling and distributing of salvageable or salvaged cosmetics.

(21) Place of business - Each location from which a salvage establishment or salvage broker operates. The term does not include a salvage warehouse.

(22) Reconditioning - Any appropriate process or procedure by which a distressed cosmetic can be brought into compliance with the standards of the department for use by the public. In addition, all reconditioned cosmetics must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(23) Sale or distribution - The act of selling or distributing, whether for compensation or not; and includes delivery; holding; or offering for sale; transfer, auction; storage; or other means of handling or trafficking.

(24) Salvage broker - A person who engages in the business of selling, distributing, or otherwise trafficking in any distressed or salvaged food, drug, device, or cosmetic and who does not operate a salvage establishment.

(25) Salvage establishment - Any place of business engaged in reconditioning or by other means salvaging distressed food, drugs, devices, or cosmetics or that sells, buys, or distributes for human use any salvaged food, drug, device, or cosmetic.

(26) Salvage operator - A person who is engaged in the business of operating a salvage establishment.

(27) Salvage warehouse - A separate storage facility used by a salvage broker or salvage establishment for the purpose of holding distressed or salvaged cosmetics.

(28) Salvageable cosmetic - Any distressed cosmetic, as defined in this section, which can be reconditioned to departmental standards.

(29) Salvaged cosmetics - Any distressed cosmetic that has been reconditioned.

(30) Sanitize - Adequate treatment of surfaces by a process that is effective in destroying vegetative cells of microorganisms of public health significance and in substantially reducing numbers of other microorganisms. Such treatments shall not adversely affect the product and shall be safe to the consumer.

(31) Vehicle(s) - Any truck, car, bus, or other means by which distressed, salvageable, or salvaged cosmetics are transported from one location to another.

§229.634. Exemptions and Applicability.

(a) A person is exempt from licensing under these sections if the person is:

(1) a manufacturer or distributor of a cosmetic who in the normal course of business engages in the activities of reconditioning the cosmetic manufactured or distributed by or for that person and not purchased by that person solely for the purpose of reconditioning and sale;

(2) a person who is a common carrier or the common carrier's agent, who disposes of or otherwise transfers an undamaged or distressed cosmetic to a person who is exempt under this section or to a licensed salvage broker or salvage operator; or

(3) a person who transfers a distressed cosmetic to a licensed salvage broker or salvage operator.

(b) An exemption from the licensing requirements under these sections does not constitute an exemption from other applicable provisions of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431, or the rules adopted to administer and enforce the Act.

(c) A salvage establishment or salvage broker who is engaging in conduct within the scope of the license issued under §229.635 of this title (relating to Licensing Requirements and Procedures) is not required to also be licensed under Health and Safety Code, Chapter 431. An exemption from the licensing requirements under Health and Safety Code, Chapter 431, does not constitute an exemption from other applicable provisions of Health and Safety Code, Chapter 431, or the rules adopted to administer and enforce the chapter.

§229.635. Licensing Requirements and Procedures.

(a) General. Except as provided by §229.634(a) of this title (relating to Exemptions and Applicability), it shall be unlawful for any person to operate a salvage establishment or act as a salvage broker within this state, who does not possess a current and valid license issued by the department.

(b) Licensing of out-of-state salvage establishments and brokers. A person who operates a salvage establishment or acts as a salvage broker outside this state may not sell, distribute, or otherwise traffic in distressed or salvaged food, drugs, devices, or cosmetics within this state unless the person holds a license from the department.

(c) Reports from other jurisdictions. The department may accept reports from authorities in other jurisdictions to determine the extent of compliance with these sections and with the provisions of the Act.

(d) New place of business. Each person acquiring or establishing a place of business for the purpose of operating a salvage establishment or operating as a salvage broker shall apply for and obtain a license of such business prior to beginning operation.

(e) Two or more places of business. If the salvage establishment or salvage broker operates more than one place of business, the

salvage establishment or salvage broker shall license each place of business separately.

(f) License application. License application forms may be obtained from the Texas Department of Health, Licensing and Enforcement Division, 1100 W. 49th Street, Austin, Texas 78756 or from the Bureau of Food and Drug Safety website at http://www.tdh.state.tx.us/bfds/lic/apps.html.

(g) Contents of initial license application. The initial application for licensing as a salvage establishment or salvage broker shall be signed and verified, shall be made on a license application form furnished by the department, and shall include the following information:

(1) the legal name under which the business is conducted;

(2) the address of the place of business to be licensed and the mailing address or billing address if different;

(3) the name, residence address, and driver's license number of the responsible individual in charge at the place of business;

(4) the hours of operation of each place of business;

(5) the address of any salvage warehouse used by a salvage establishment or salvage broker;

(6) if a proprietorship, the name and residence address of the proprietor; if a partnership, the names and residence addresses of all partners; if a corporation, the date and place of incorporation and name and address of its registered agent in the state and corporation charter number; or if any other type of association, then the names of the principals of such association; and

(7) a statement signed and verified by the sole proprietor, managing partner, corporate officer, or person in a managerial capacity for an association that acknowledges the applicant has read, understood, and agrees to abide by the provisions of these sections and those of the Act.

(h) Issuance of license. In accordance with §229.281 of this title (relating to Processing Permit Applications Relating to Food and Drug Operations), the department may license a salvage establishment or salvage broker who meets the requirements of these sections.

(i) Transfer of license. Licenses shall not be transferable from one person to another or from one place of business to another.

(j) Display of license. The license shall be displayed in an open public area at each place of business and each salvage operator shall have a copy of a valid license in each vehicle used by the salvage operator to transport distressed cosmetics.

(k) License expiration. Unless the department revokes or suspends a license as provided in §229.644 of this title (relating to Enforcement and Penalties), the initial license shall be valid for one year from the date of issuance which becomes the anniversary date.

(l) Renewal of license.

(1) Each year prior to the anniversary date, the salvage establishment or salvage broker shall renew its license following the requirements of this section.

(2) The renewal license shall be valid for one year from the anniversary date.

(3) The license renewal application and nonrefundable renewal fee for each place of business shall be submitted to the department prior to the expiration date of the current license in accordance with the procedures in this section. A person who files a renewal application after the expiration date must pay an additional $100 as a delinquency fee.

(4) The department shall renew the license of a licensee who submits a renewal application and pays the renewal fee after finding that the licensee is in compliance with these sections as determined by an inspection of the licensee's place of business or as outlined in subsection (c) of this section.

(5) Renewal license application. The renewal application for licensing as a salvage establishment or salvage broker shall be made on a license application form furnished by the department and can be obtained as referenced in subsection (f) of this section.

(m) Completeness of license applications. Failure to complete the initial or renewal license application form may result in the denial of a license.

(n) Report of changes. The license holder shall notify the department in writing within ten days of any change, including a change in location, name or ownership of a salvage establishment or salvage broker, which would render the information contained in the initial license application no longer accurate. Failure to inform the department within ten days of a change in the information required in the initial license application may result in enforcement action as described in §229.644 of this title (relating to Enforcement and Penalties).

(o) Amendment of license. A license that is amended, including a change of name, ownership, or a notification of a change in the location of a licensed place of business will require submission of an application as outlined in subsection (g) of this section and submission of fees as outlined in §229.636 of this title (relating to Licensing Fees).

(p) Return of license. A license issued under these sections shall be returned to the department if the place of business:

(1) ceases business or otherwise ceases operation on a permanent basis;

(2) relocates;

(3) changes the name of the business under which the salvage establishment or salvage broker operates; or

(4) changes ownership.

§229.636. Licensing Fees.

(a) Licensing fees.

(1) Annual fee. All salvage establishments and salvage brokers operating in Texas shall obtain a license annually from the department and shall pay a nonrefundable fee for each place of business.

(A) Except as provided for in subparagraph (B) of this paragraph, salvage establishments and salvage brokers shall pay a nonrefundable annual licensing fee of $400.

(B) A salvage establishment or salvage broker that engages in the business of reconditioning, selling, distributing, or otherwise trafficking in distressed or salvaged devices shall pay a nonrefundable annual licensing fee of $550.

(2) Delinquency fee. A salvage establishment or salvage broker must pay a $100 delinquency fee if:

(A) the renewal license application is submitted or the renewal license fee is paid after the expiration date of the current license; or

(B) the initial license application is submitted or the initial license fee is paid more than 30 days following the effective date of a change in location, name, or ownership of an existing salvage establishment or salvage broker as described in §229.635(o) of this title (relating to Licensing Requirements and Procedures).

(3) Reinspection fee. A salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to §229.644 of this title (relating to Enforcement and Penalties), shall pay a nonrefundable inspection fee of $400.

(b) Consolidation of multiple anniversary dates. The department may, upon receipt of a written request from a license holder, prorate an annual license fee for the purpose of consolidating the anniversary dates of multiple licenses issued in the name of the license holder.

(c) Exemption from licensing fees. A person is exempt from the licensing fees required by this section if the person is a nonprofit organization, as described in the Internal Revenue Code of 1986, §501(c)(3), as amended, or a nonprofit affiliate of the organization, to the extent otherwise permitted by law.

§229.637. Personnel.

(a) Employee health requirements. No person known to be or suspected of being affected with any disease in a communicable form, or while a carrier of such disease, or while afflicted with boils, infected wounds, sores, or respiratory infection, shall work in an area of a salvage establishment or for a salvage broker in any capacity in which there is any possibility of such person contaminating salvageable or salvaged cosmetics with pathogenic organisms, or transmitting disease to other individuals.

(b) Personal cleanliness.

(1) All personnel while working in direct contact with salvageable cosmetics or while engaged in reconditioning, repacking, or otherwise handling any components or accessories of salvageable cosmetics shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

(2) Personnel engaged in reconditioning salvageable cosmetics shall wash their hands thoroughly in a department approved hand-washing facility before starting work, and as often as may be necessary to remove soil and contamination.

(3) No person shall resume work after visiting the toilet room without first washing their hands.

§229.638. Construction and Maintenance of Physical Facilities.

(a) Buildings. Buildings used by salvage establishments and salvage brokers shall be of suitable design and contain sufficient space to perform necessary operations, prevent mix-ups, and assure orderly handling.

(b) Floor construction.

(1) The floor surfaces in all rooms and areas in which salvageable or salvaged cosmetics are stored or processed and in which tools or equipment are washed, and walk-in refrigerators, dressing or locker rooms and toilet rooms, shall be constructed to be smooth and easily cleanable.

(2) Any floor that is exposed to water or liquids shall be constructed and maintained to be nonabsorbent.

(3) All floors shall be kept clean and in good repair.

(4) Floor drains shall be provided in all rooms where floors are subjected to flooding-type cleaning or where normal operations release or discharge water or other liquid waste on the floor.

(c) Walls and ceilings. Walls and ceilings of all rooms shall be clean, smooth, and in good repair.

(d) Lighting. Adequate lighting shall be provided in hand-washing areas, dressing and locker rooms, and toilet rooms and in all areas where salvageable or salvaged cosmetics are examined, processed, or stored and where equipment or tools are cleaned.

(1) Where personnel are inspecting, sorting, or reconditioning distressed cosmetics, at least 540 lux (50 foot candles) of light shall be provided at the work surface.

(2) At all other areas of the facility where light is required, at least 110 lux (ten foot candles) of light shall be provided when measured at a distance of 30 inches above the floor.

(e) Ventilation.

(1) All rooms, in which salvageable or salvaged cosmetics are reconditioned or utensils are washed, dressing or locker rooms, toilet rooms, and garbage and refuse storage areas shall be well ventilated.

(2) Ventilation hoods and related equipment when used shall be designed to prevent condensation from dripping onto salvageable cosmetics or onto work surfaces.

(3) Filters, when used, shall be readily removable for cleaning or replacement.

(4) Ventilation systems shall comply with applicable federal, state, and local fire prevention and air pollution requirements.

(f) Locker area. Adequate facilities shall be provided for the orderly storage of personnel clothing and personal belongings.

(g) Cleanliness of facilities.

(1) All parts of the salvage establishment or salvage warehouse and its premises shall be kept neat, clean, and free of litter and refuse.

(2) Cleaning operations shall be conducted in such a manner as to prevent contamination of salvageable and salvaged cosmetics.

(3) None of the operations connected with a salvage establishment or salvage warehouse shall be conducted in any room used as a personnel lounge or toilet facility, or living or sleeping quarters.

(4) Soiled coats and aprons shall be kept in suitable containers until removed for laundering.

(5) No birds or animals shall be allowed in any areas used for the conduct of salvage establishment operations or the storage of salvageable and salvaged cosmetics, except that guide dogs accompanying blind persons shall be permitted in sales areas.

(h) Vehicles. Vehicles used to transport distressed, salvageable, or salvaged cosmetics shall be maintained in a clean and sanitary condition to protect the product from contamination.

§229.639. Sanitary Facilities and Controls.

(a) Water supply. The water supply shall be adequate, of a safe, sanitary quality, and from a source constructed and operated in accordance with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(b) Sewage. All sewage, including liquid waste, shall be disposed of in a public sewerage system or, in the absence thereof, in a manner applicable with the Minimum Standards of Sanitation and Health Protection, Health and Safety Code, Chapter 341, and rules promulgated under this chapter.

(c) Plumbing. Plumbing shall be sized, installed, and maintained in accordance with applicable state and local plumbing codes.

(d) Toilet facilities.

(1) Each salvage establishment shall provide its personnel with adequate and conveniently located toilet facilities.

(2) Toilet facilities, including rooms and fixtures, shall be kept in a clean condition and in good repair at all times.

(3) The doors of all toilet rooms shall be self-closing.

(4) Toilet tissue shall be provided.

(5) Easily cleanable receptacles shall be provided for waste materials, and such receptacles in toilet rooms for women shall be covered.

(6) Where the use of non-water-carried sewage disposal facilities are approved by the department they shall be located at least 100 linear feet from the salvage establishment and from any well or stream.

(e) Hand-washing facilities. Each salvage establishment shall be provided with adequate, conveniently located hand-washing facilities for its personnel, including a lavatory or lavatories equipped with hot and cold or tempered running water, hand-cleansing soap or detergent, and approved sanitary towels or other approved hand-drying devices. Such facilities shall be kept clean and in good repair.

(f) Garbage and refuse.

(1) All organic or organic-containing refuse shall be kept in leak proof, non-absorbent containers which shall be kept covered with tight-fitting lids when filled or stored, or not in continuous use. Such containers shall be covered when stored and stored in either a vermin-proof room or enclosure or in a waste refrigerator. Paper, cardboard, unused equipment, and non-organic refuse shall be stored in containers, rooms, or areas in such a manner to prevent it from becoming a source of contamination or pest harborage.

(2) Adequate cleaning facilities shall be provided, and each container, room, or area shall be thoroughly cleaned after the emptying or removal of refuse.

(3) All refuse shall be disposed of with sufficient frequency and in such a manner as to prevent contamination.

(4) All refuse shall be disposed of in accordance with all applicable state and local requirements, including requirements for solid waste disposal as referenced in Title 30, Texas Administrative Code, Chapters 330, 335, and 336.

(g) Insect and rodent control. Effective measures shall be taken to protect against the entrance into the salvage establishment or salvage warehouse, and the breeding or presence on the premises of rodents, insects, and other vermin.

§229.640. General Provisions for Handling and Movement of Distressed Cosmetics.

(a) Notice to the department.

(1) When the source of distressed cosmetics is the result of a natural disaster, accident, power failure, or other emergency, the salvage establishment or salvage broker shall make contact with the department's Bureau of Food and Drug Safety within 24 hours after their initial awareness of the emergency and prior to any removal of distressed cosmetics from the place at which it was located when it became distressed.

(2) If emergency removal of distressed cosmetics referenced in subsection (a)(1) of this section is required, notice to the department shall be made as soon thereafter as possible. It shall be the duty of the salvage establishment or salvage broker to make contact with the department's Bureau of Food and Drug Safety within 48 hours whenever distressed cosmetics subject to the provisions subsection (a)(1) of this section are obtained.

(3) Distressed cosmetics referenced in this subsection shall not be moved out of the State of Texas without the prior approval of the department and the responsible state agency in the state to receive the cosmetics. Concurrence shall also be obtained from the U.S. Food and Drug Administration prior to interstate movement.

(b) Protection of salvageable and salvaged cosmetics.

(1) All salvageable and salvaged cosmetics stored by salvage establishments or salvage brokers shall be held at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such cosmetics.

(2) All salvageable and salvaged cosmetics, while being stored or processed at a salvage establishment, salvage warehouse, or during transportation, shall be protected from contamination.

(3) Poisonous and toxic materials shall be identified and handled under such conditions as will not contaminate other salvageable or salvaged cosmetics, or constitute a hazard to personnel.

(c) Segregation of cosmetics. All salvageable cosmetics shall be promptly sorted and segregated from nonsalvageable cosmetics to prevent further contamination of the distressed cosmetics to be salvaged or offered for sale or distribution.

(d) Nonsalvageable cosmetics.

(1) Containers, including metal and glass containers with press caps, screw caps, pull rings, or other types of openings which have been in contact with nonpotable water, liquid foam, or other deleterious substances, as a result of fire fighting efforts, flood, sewer backups, or similar mishaps, shall be deemed unfit for sale or distribution, i.e., nonsalvageable cosmetics as defined in §229.633(18) of this title (relating to Definitions).

(2) Nonsalvageable cosmetics shall be disposed of as in §229.639(f)(4) of this title (relating to Sanitary Facilities and Controls) or §229.641(b) of this title (relating to Handling Distressed Cosmetics); or by delivery to a waste reclamation (recycling) facility for destruction.

(3) Distressed cosmetics which are deemed to be nonsalvageable by a duly authorized agent of the department shall, at the request of the agent, be destroyed under the supervision of that agent at the expense of the owner.

(e) Transporting of distressed cosmetics.

(1) Distressed cosmetics shall be moved from the site of a fire, flood, sewer backup, wreck, or other cause as expeditiously as possible after compliance with subsection (a) of this section, if applicable, so as not to become hazardous to public health.

(2) All distressed cosmetics of a temperature sensitive nature shall, prior to reconditioning, be transported only in vehicles capable of maintaining adequate temperatures, if necessary, for product integrity.

(f) Handling of distressed articles other than cosmetics. If distressed articles other than cosmetics are also salvaged, they shall be handled separately so as to prevent contamination from poisonous and toxic materials or other contaminants.

(g) Cross-contamination protection. Sufficient precautions shall be taken to prevent cross-contamination among the various types of cosmetics that are salvageable or salvaged.

(h) Reconditioned drugs. All reconditioned cosmetics must be in compliance with the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431.

(i) Labeling. All salvaged cosmetics must be labeled in accordance with the requirements of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, Chapter 431; the Federal Food, Drug, and Cosmetic Act, 21 U.S.C., §301 et seq. as amended; the Fair Packaging and Labeling Act, 15 U.S.C., §1451 et seq. as amended; and the federal regulations promulgated under those Acts.

(j) Salvage warehouses. A person may not use a salvage warehouse to recondition cosmetics or sell to consumers.

§229.641. Handling Distressed Cosmetics.

(a) Good manufacturing practices. A person must follow and comply with the requirements in 21 CFR, Part 701, titled "Cosmetic Labeling" and 21 CFR, Part 740, titled "Cosmetic Product Warning Statements" as amended, in the handling and reconditioning of all salvaged cosmetics.

(b) Distressed or nonsalvageable cosmetics. All distressed or nonsalvageable cosmetics shall be destroyed.

(c) Relabeling. All salvaged cosmetics in containers shall be provided with labels meeting the requirements in §229.640(i) of this title (relating to General Provisions for Handling and Movement of Distressed Cosmetics). Where original labels are removed from containers that are to be resold or redistributed, the replacement labels must show the name and address of the salvage establishment.

§229.642. Records.

(a) Inventory Records. A written record or receipt of distressed, salvageable, and salvaged cosmetics shall be maintained by the salvage establishment or salvage broker and shall include:

(1) the common name and brand name or manufacturer and quantity of the cosmetic received;

(2) the source of the distressed, salvageable, and salvaged cosmetics;

(3) the date received;

(4) a brief description of the type or cause of damage (fire, flood, wreck, prolonged storage, warehouse damage, etc.); and

(5) the name of the individual or business that purchases any such cosmetics for the purpose of sale or distribution and the date of any such transaction.

(b) Retention of records. All records required in these sections shall be kept at the place of business of the salvage establishment or salvage broker for a period of two years following the completion of transactions involving a lot of cosmetics.

(c) Electronic records. Records required by these sections which are maintained by the salvage establishment or salvage broker on computer systems shall be regularly copied, at least monthly, and updated on storage media other than the hard drive of the computer. An electronic record must be retrievable as a printed copy.

§229.643. Inspection.

(a) Inspection. To enforce these sections or the Act, the commissioner or an authorized agent may, on presenting appropriate credentials to the owner, operator, or agent in charge of a place of business:

(1) enter at reasonable times the place of business of a salvage establishment or salvage broker;

(2) enter a salvage warehouse used to store or hold distressed or salvaged cosmetics;

(3) enter a vehicle being used to transport or hold distressed or salvaged cosmetics; or

(4) inspect at reasonable times, any place of business of a salvage establishment or salvage broker, salvage warehouse, or vehicle and all equipment, finished and unfinished materials, containers, and labeling of any item and obtain samples necessary for the enforcement of these sections or the Act.

(b) Access to records. A person who is required to maintain records referenced in these sections or under the Act or a person who is in charge or custody of those records shall, at the request of the commissioner or an authorized agent, permit the commissioner or authorized agent at all reasonable times access to review, copy, and verify the records.

(c) Access to records showing movement in commerce. A person who is subject to licensing under §229.635 of this title (relating to Licensing Requirements and Procedures) or a person, including a common carrier or the common carrier's agent, who disposes of or otherwise transfers distressed or salvaged cosmetics shall, at the request of the commissioner or an authorized agent, permit the commissioner or authorized agent at all reasonable times access to review, copy, and verify all records showing:

(1) the movement in commerce of any distressed or salvaged cosmetic;

(2) the holding of any distressed or salvaged cosmetic after movement in commerce; and

(3) the quantity, shipper, and consignee of any distressed or salvaged cosmetics.

(d) Receipt for samples. The commissioner or an authorized agent who makes an inspection of a place of business, including any vehicle or salvage warehouse, and obtains a sample during or on completion of the inspection and before leaving the place of business, shall give to the owner, operator, or the owner's or operator's agent a receipt describing the sample.

§229.644. Enforcement and Penalties.

(a) General license actions. The department may deny, suspend, or revoke the license of an applicant or licensee who fails to comply with the Act or these sections.

(b) License denials.

(1) The department may deny an application for a license if the applicant fails to meet the standards or requirements of the Act or these sections.

(2) The department shall give the applicant written notice of the denial, the reasons for the denial, and opportunity for a hearing.

(c) Emergency license suspensions.

(1) The department may suspend a license without notice when there is an imminent threat to the health and safety of the public.

(2) If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(d) Nonemergency license suspensions.

(1) The department may suspend a license when the licensee violates any one of the following requirements:

(A) failure to comply with the Act or these sections; or

(B) falsification of information provided in an application for a license.

(2) The department shall give the licensee written notice of the proposed suspension, including the reasons for the suspension and an opportunity for a hearing.

(e) License revocations.

(1) The department may revoke a license when the licensee:

(A) violates the provisions of the Act or these sections;

(B) refuses to allow the department to conduct an inspection or collect samples;

(C) interferes with the department in the performance of its duties;

(D) removes or disposes of a detained cosmetic in violation of the Texas Food, Drug, and Cosmetic Act, Health and Safety Code, §431.021; or

(E) fails to inform the department of any salvage warehouse(s) at the time of an inspection or when requested by the department.

(2) Prior to revoking the license, the department shall give the licensee written notice of the proposed revocation, including the reasons for the revocation and an opportunity for a hearing.

(f) License hearings.

(1) Any hearings for the denial, suspension, emergency suspension, or revocation of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to the Texas Board of Health) and the Administrative Procedure Act, Government Code, Chapter 2001.

(2) Within ten days after an emergency suspension or within 20 days after the postmark date of the department's written notice of proposed denial, suspension, or revocation, the applicant or licensee may request a hearing in writing from the department's Bureau of Food and Drug Safety. If the applicant or licensee does not request a hearing during the required time period, then the applicant or licensee is deemed to have waived his/her right to a hearing.

(g) Reinstatement of license.

(1) A person whose application for a license has been denied or whose license has been placed under an emergency suspension may request a reinspection for the purpose of granting or reinstating a license not later than the 30th day after the denial or emergency suspension. Not later than the tenth day after the receipt of a written request from the applicant or licensee, the department shall make a reinspection.

(2) As regards a nonemergency suspension or a revocation, the licensee may request at any time, an inspection for reinstating the license or for issuing a new license.

(3) If, after inspection, the department determines that the applicant or licensee meets the requirements of the Act or these sections, the department shall reinstate the license or issue a new license, as appropriate.

(4) Reinspection fee. Except as provided for in §229.636(c) of this title (relating to Licensing Fees), a salvage establishment or salvage broker who requests reinstatement of a license that has been denied, suspended, or revoked pursuant to this section shall pay a nonrefundable inspection fee of $400.

(h) Emergency order.

(1) General. The commissioner or the commissioner's designee may issue an emergency order, either mandatory or prohibitory, concerning the sale or distribution of distressed cosmetics in the department's jurisdiction if the commissioner or the commissioner's designee determines that:

(A) the sale or distribution of those cosmetics creates or poses an immediate and serious threat to human life or health; and

(B) other procedures available to the department to remedy or prevent the threat will result in unreasonable delay.

(2) Absence of notice and hearing. The commissioner or the commissioner's designee may issue the emergency order without notice and hearing if the commissioner or the commissioner's designee determines it is necessary under the circumstances.

(3) Hearings. If an emergency order is issued without a hearing, the department, not later than the 30th day after the date on which the emergency order was issued, shall determine a time and place for a hearing at which the emergency order will be affirmed, modified, or set aside. The hearing shall be held under departmental formal hearing rules.

(i) Administrative penalty. If a person violates these sections, or an order adopted or license issued under the Act, the commissioner may assess an administrative penalty against the person.

(1) The penalty may not exceed $25,000 for each violation. Each day a violation continues is a separate violation.

(2) In determining the amount of the penalty, the commissioner shall consider the following criteria:

(A) the person's previous violations;

(B) the seriousness of the violation;

(C) any hazard to the health and safety of the public;

(D) the person's demonstrated good faith; and

(E) other matters as justice may require.

(3) Violations subject to this subsection shall be categorized into severity levels as determined in §229.261 of this title (relating to Assessment of Administrative or Civil Penalties).

(4) Hearings, appeals from, and judicial review of final administrative decisions under this subsection shall be conducted according to the contested case provisions of the Government Code, Chapter 2001, and the board's formal hearing rules found in Chapter 1 of this title.

(5) An administrative penalty may be assessed only after a person charged with a violation is given an opportunity for a hearing.

(6) If a hearing is held, the commissioner shall make findings of fact and shall issue a written decision regarding the occurrence of the violation and the amount of the penalty.

(7) If the person charged with the violation does not request a hearing, the commissioner may assess a penalty after determining that a violation has occurred and the amount of the penalty.

(8) After making a determination under this subsection that a penalty is to be assessed, the commissioner shall issue an order requiring that the person pay the penalty.

(9) The commissioner may consolidate a hearing held under this subsection with another proceeding.

(10) Not later than the 30th day after the date of issuance of an order finding that a violation has occurred, the commissioner shall

inform the person against whom the order is issued of the amount of the penalty.

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

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Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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CHAPTER 229. FOOD AND DRUG

The Texas Department of Health (department) proposes the repeal of §229.281, and new §229.281, concerning the processing of license/permit applications relating to food and drug operations for the following programs within the Bureau of Food and Drug Safety: food wholesaler and manufacturer, wholesale drug manufacturer and distributor, device manufacturer and distributor, narcotic treatment program, retail food establishment, tanning facility, tattoo studio, body piercing studio, salvage establishment, and salvage broker.

The title of the subchapter and new rule and the language have been changed to more accurately reflect the fact that both licenses and permits are issued by the department. Persons and entities that will be impacted by this rule include the department staff and persons who apply for a license/permit.

Government Code, Chapter 2005, requires a state agency to adopt procedural rules for processing applications and issuing licenses. The proposed rule complies with the Government Code, §2005.003, by establishing a time period for the processing of an application and issuing a license, §2005.004 by establishing good cause justification for a state agency to exceed the specified time period, and §2005.006 by establishing a complaint procedure for an applicant to use if the state agency exceeds the specified time period and providing for an applicant to be reimbursed if appropriate.

Government Code §2001.039 requires each state agency to review and consider for adoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). The current rule has been reviewed and the department has determined that reasons for adopting the section continue to exist. However, because substantial changes have been made to simplify this section, the current rule is being repealed and a new rule is proposed.

The department published a Notice of Intention to Review for §229.281 in the *Texas Register* on February 25, 2000 (25 TexReg 1731). No comments were received as a result of the publication of the notice.

Derek Jakovich, Director, Licensing and Enforcement Division, has determined that for each year of the first five-year period the sections are in effect, there will be no fiscal implications to state or local government as a result of administering the sections as proposed. There will be no impact to local employment.

Mr. Jakovich has also determined that for each of the first five years the rules are in effect, the public benefit will be the timely processing of applications and issuance of licenses to Texas businesses, and the establishment of a complaint procedure for applicants whose application is not processed in a timely manner. There will be no adverse economic effect on micro-businesses and/or small businesses and persons whose license is not processed in a timely manner in accordance with the new section.

Comments on the proposed rule may be submitted to Derek Jakovich, Director, Licensing and Enforcement Division, Bureau of Food and Drug Safety, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512) 719-0222. Comments will be accepted for 30 days following publication of the proposed rule in the *Texas Register*.

SUBCHAPTER Q. PERMIT APPLICATIONS

25 TAC §229.281

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

The repeal is proposed under the Government Code, Chapter 2005, which requires the department to adopt procedural rules for processing applications and issuing licenses; and the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed repeal affects the Government Code, Chapter 2005, and the Health and Safety Code, Chapter 12; and implements the Government Code §2001.039.

§229.281. Processing Permit Applications Relating to Food and Drug Operations.

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

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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SUBCHAPTER Q. LICENSE/PERMIT APPLICATIONS

25 TAC §229.281

The new section is proposed under the Government Code, Chapter 2005, which requires the department to adopt procedural rules for processing applications and issuing licenses; and the Health and Safety Code, §12.001, which provides the Texas Board of Health (board) with the authority to adopt rules for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The proposed new section affects the Government Code, Chapter 2005, and the Health and Safety Code, Chapter 12; and implements the Government Code §2001.039.

§229.281. Processing License/Permit Applications Relating to Food and Drug Operations.

(a) Definition. For purposes of this section, license means a license, permit, registration, or certificate issued by the Texas Department of Health (department) for a food wholesaler and manufacturer, wholesale drug manufacturer and distributor, device manufacturer and distributor, tanning facility, tattoo studio, body piercing studio, salvage broker, salvage establishment, retail food establishment, or narcotic treatment program. This subchapter is not applicable to food manager certification.

(b) General. Time periods for processing and issuing a license.

(1) The date a license application is received by the Bureau of Food and Drug Safety, Texas Department of Health, is the date the original application reaches the department.

(2) An application for a license is complete when the department has received, reviewed, and found acceptable the application information and fee required by the appropriate sections of this title (25 Texas Administrative Code (TAC), Chapter 229, Food and Drug, relating to Licensing Fees, Procedures, Requirements).

(3) An application for an annual renewal of a license is complete when the department has received, reviewed and found acceptable the application information and fee required by the appropriate section of this title (25 TAC, Chapter 229, Food and Drug, relating to Licensing Fees, Procedures, Requirements).

(4) An application for an amendment of a license is complete when the department has received, reviewed, and found acceptable the application information and fee required by the appropriate section of this title (25 TAC, Chapter 229, Food and Drug relating to Licensing Fees, Procedures, Requirements).

(c) Time Periods. An application for a license shall be processed in accordance with the following time periods.

(1) The first time period is 45 calendar days, which begins on the date the department receives the application and ends on the date the license is issued. If an incomplete application is received, the period ends on the date the facility is issued a written notice that the application is incomplete. The written notice shall describe the specific information or fee that is required before the application is considered complete.

(2) The second time period is 45 calendar days, which begins on the date the last item (information or fee) necessary to complete the application is received by the department and ends on the date the license is issued, or the facility is issued a written notice that the application is being proposed for denial.

(3) If the applicant fails to submit the requested information and/or fee within 135 days of the date the department issued the written notice to the applicant as described in paragraph (1) of this subsection, that the application is incomplete and/or additional fees are owed, the application is considered withdrawn. Fees paid are not refundable. There will be no refund of the fee except as provided by subsections (d) and (f) of this section. A new application and fee must be submitted to the department.

(d) Reimbursement of fees.

(1) In the event the application is not processed within the time periods stated in subsection (c) of this section, the applicant has the right to make a written request within 30 days of the end of the second period that the department reimburse in full the fee paid in that particular application process.

(2) If the department finds that good cause existed for exceeding the established periods, the request will be denied. The department will notify the applicant in writing of the denial of the reimbursement within 30 days of the department's receipt of the request for reimbursement.

(e) Good cause for exceeding the period established is considered to exist if:

(1) the number of applications for licenses to be processed exceeds by 15% or more the number processed in the same calendar quarter the preceding year;

(2) another public or private entity utilized in the application process caused the delay;

(3) conditions in violation of the rules exist which are noted in recent investigations or inspections;

(4) the application is being held pending completion of an investigation, inspection, or enforcement action;

(5) the application is incomplete in information, signature, and/or fee amount submitted; or

(6) other conditions existed giving good cause for exceeding the established periods.

(f) Appeal. If the request for reimbursement as authorized by subsection (d)(1) of this section is denied, the applicant may, within 30 days of being notified of the denial, appeal to the Commissioner of Health (commissioner) for a resolution of the dispute. The applicant shall give written notice to the commissioner requesting reimbursement of the fee paid because the application was not processed within the established time period. Within 30 days of receiving the appeal, the Bureau of Food and Drug Safety, Licensing and Enforcement Division Director, shall submit a written report to the commissioner of the facts related to the processing of the application and describing the good cause for exceeding the established time periods. The commissioner then has 30 days to make the final decision and provide written notification of the decision to the applicant and the Licensing and Enforcement Division Director.

(g) Hearings shall be conducted under the provision of contested case hearings pursuant to the department's formal hearing procedures in Chapter 1 of this title (relating to the Texas Board of Health) and the Administrative Procedure Act, Government Code, Chapter 2001.

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

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Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 265. GENERAL SANITATION
SUBCHAPTER K. REGISTRATION OF SANITARIANS

The Texas Department of Health (department) proposes the repeal of §265.147, an amendment to §265.143, and new §265.147 concerning the registration of sanitarians. Specifically, the amendment and new rule cover fees and approval process of continuing education programs. The rules are necessary to offset current costs associated with administering the sanitarian program.

Becky Berryhill, Chief, Bureau of Licensing and Compliance, has determined that for the first five year period the sections will be in effect, there will be fiscal implications as a result of enforcing the sections as proposed. The proposed increase in registration fees is estimated to generate additional revenues of $65,000 each year of the first five years for state government. The increased fees will offset current costs associated with administering these sections. Additionally, state agencies which employ sanitarians and pay their renewal fees will incur additional costs of approximately $50 annually per employee. There may be an effect on local governments if they choose to pay the fees of their sanitarian employees.

Ms. Berryhill has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to ensure appropriate and adequate regulation of sanitarians in Texas. The sections increase fees and streamline continuing education approvals. There will be no effect on small businesses and no effect on micro-businesses because the Sanitarian Registration Act provides only for the registration of individuals. There are anticipated economic costs to persons who are required to comply with the sections as proposed of approximately $50 annually. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Yvonne Feinleib, Program Administrator, Sanitarian Registration Program, Professional Licensing and Certification Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3183, (512) 834-4517. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

25 TAC §265.143, §265.147

The amendment and new section are proposed under the Texas Revised Civil Statutes, Article 4477-3, which provides the Board of Health (board) with authority to adopt rules prescribing fees and administering continuing education requirements; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department or the commissioner of health.

The amendment and new section affect Texas Civil Statutes, Article 4477-3.

§265.143. Fees.

(a) (No change.)

(b) The schedule of fees is as follows:

(1) application processing fee:

(A) sanitarian-in-training - $75 [~~$25~~]; or

(B) registered sanitarian (including reciprocity) - $90 [~~$40~~];

(2) (No change.)

(3) Annual license renewal fee:

(A) sanitarian-in-training (one-time renewal for a two year period) - $150 [~~$50~~]; or

(B) registered Sanitarian - $75 [~~$25~~];

(4) reinstatement (late) fee - $75 [~~$25~~];

(5) processing fee for upgrading from a sanitarian-in-training to a sanitarian - $90 [~~$40~~];

(6) - (8) (No change.)

(9) continuing education sponsor approval fee - $100 per sponsor. Government agencies and accredited institutions of higher education are exempt from this fee.

[~~(9) continuing education course review fee - $25 per course. The fees is for the department's review of the continuing education course material to establish compliance with these rules. The department, federal agencies, accredited institutions of higher education, and other state agencies are exempt from this fee, if all other requirements for course content and records are met.~~]

(c) - (d) (No change.)

[~~(e) On and after September 1, 2000, renewal licensing as a sanitarian will be on an anniversary date established by the department. Registrants not already issued an anniversary date for future license renewal will receive a renewal notice establishing their anniversary date and the renewal license fee due to the department. Registrants with a September anniversary date must pay the annual renewal license fee. Registrants with an anniversary date of October or later must pay a renewal license fee of $2.00 for each month they will be registered prior to their anniversary date at which time they must pay the annual renewal license fee.~~]

§265.147. Continuing Education Requirements.

(a) Each registered sanitarian licensed by the department must meet the renewal requirements set out in this section.

(b) Each registered sanitarian must obtain and show proof of not less than twelve continuing education units related to the fields of consumer health, environmental health or sanitation within the twelve months preceding renewal of their license.

(c) Only the following continuing education activities shall serve as a basis for registration renewal:

(1) approved by the department or its designee in accordance with this section; or

(2) approved by another professional regulatory agency in the State of Texas as acceptable continuing education for license renewal.

(d) Only continuing education activities provided by one of the following types of sponsors shall be approved by the department in accordance with these rules:

(1) a governmental agency;

(2) an accredited college or university;

(3) an association with a membership of 25 or more persons; or

(4) a commercial education business.

(e) Government agencies and accredited colleges and universities are pre-approved as sponsors for continuing education when the activity is conducted or sponsored in compliance with these rules.

(f) Continuing education activities conducted by approved sponsors must meet the following criteria:

(1) the activity must have significant educational or practical content to maintain appropriate levels of competency;

(2) the activity must have a record keeping procedure provided by the sponsor which includes a register of who took the course and the number of continuing education units earned;

(3) the sponsor must include procedures for verifying participant's attendance as well as comprehension of subject matter presented. These procedures may include, but are not limited to, examinations, post-activity questionnaires, field demonstrations, in-class workbooks or handout materials, and/or question and answer periods to assure participant understanding of the subject matter;

(4) the activity must be at least 50 minutes in length of actual instruction time. Round table discussions and more than one speaker for the total of 50 minutes per activity is permissible. No credit will be given for time used to promote the sponsor or other nonrelevant activities; and

(5) the sponsor must ensure the activity complies with all applicable federal and state laws, including the Americans with Disabilities Act (ADA) requirements for access to activities.

(g) Acceptable continuing education activities include the following:

(1) conferences;

(2) home-study training modules (including professional journals requiring successful completion of a test document);

(3) lectures;

(4) panel discussions;

(5) seminars;

(6) accredited college or university courses;

(7) video or film presentations with live instruction;

(8) field demonstrations;

(9) teleconferences;

(10) computer based training; or

(11) other activities approved by the department.

(h) Continuing education instructors must have one of the following credentials:

(1) certification as a registered sanitarian by the department;

(2) instructors at the Texas Engineering Extension Service;

(3) hold a faculty position at an accredited college or university;

(4) department personnel; or

(5) teaching or work experience determined by the sponsor to be sufficient.

(i) To obtain department approval to provide approved continuing education, the sponsor must submit:

(1) a completed application on department forms;

(2) the fee prescribed in §265.143(b)(9) of this title (relating to Fees); and

(3) any additional information or material requested by the department.

(j) The application and information must be submitted to the department at least 60 days in advance of the first date on which the sponsor plans to provide continuing education activities.

(k) The department shall approve, reject, or request additional information within 30 days of receipt of the application.

(l) Each approved continuing education sponsor shall be sanctioned for one year from date of approval. Sponsors who wish to continue approval should submit a sponsor approval form and fee as prescribed in §265.143(b)(9) of this title at least 30 days prior to the end of the one year period.

(m) Documentation of continuing education activity shall be on a roster form that includes the name, address, phone number, registered sanitarian license number, social security number (used to coordinate continuing education activity information with the department's records), and signature of the department registered sanitarian.

(n) Sponsors of approved continuing education activities shall:

(1) at the conclusion of the activity distribute to those registered sanitarians who have successfully completed the activity a certificate of completion which shall include the name of the sponsor, the date and name of the activity, and the continuing education units earned;

(2) maintain a copy of the roster for two years and provide it to the department upon request.

(o) Each registered sanitarian shall collect and keep certificates of completion from all courses completed. These certificates of completion will be used to document a registered sanitarian's attendance at approved courses. Transcripts showing coursework in environmental or consumer health from an accredited college or university will also be accepted. The department will conduct random audits for compliance with this requirement.

(p) The department may deny, revoke, or refuse to renew approval if the sponsor fails to maintain or provide records related to the provision of continuing education to the department, or fails to comply with any other requirements that are a basis for approval or that are a part of this subchapter.

(q) A registered sanitarian or sponsor may file a written request for an extension of time for compliance with any deadline in this subsection. Such request for extension, not to exceed 90 days, shall be granted by the department if the registered sanitarian or sponsor files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause includes, but is not limited to, extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(r) Transition. Course sponsors who submitted one or more activities to the department and received approval between September 1, 2000, and September 1, 2002, will be approved for one year without payment of a fee upon completion and submission of the sponsor approval form within 90 days of the effective date of these 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 July 26, 2002.

TRD-200204653
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
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25 TAC §265.147

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

The repeal is proposed under the Texas Revised Civil Statutes, Article 4477-3, which provides the Board of Health (board) with authority to adopt rules prescribing fees and administering continuing education requirements; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department or the commissioner of health.

The repeal affects Texas Civil Statutes, Article 4477-3.

§265.147. Continuing Education 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.

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Susan Steeg
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CHAPTER 297. INDOOR AIR QUALITY

The Texas Department of Health (department) proposes the repeal of §§297.1 - 297.6 and proposes new §§297.1 - 297.10, concerning voluntary guidelines for indoor air quality (IAQ) in government buildings. The repeal of §§297.1 - 297.6 is necessary because House Bill 2008 (HB 2008), passed in the 77th Legislature, 2001, amended the Health and Safety Code, Subtitle C, Title 5, Chapter 385, to require the Texas Board of Health (board) to establish voluntary guidelines for indoor air quality in government buildings rather than only in public school buildings. The proposed new sections include the changes necessary to cover other government buildings as well as public schools. The sections include recommendations for implementing an IAQ program; considerations regarding building design, construction, renovation, maintenance and operation; responsibilities of building occupants; guidance for assessing and resolving IAQ problems; guidelines on comfort and minimum risk levels; lease agreements; and special considerations.

Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 297.1 - 297.6 has been reviewed and the department has determined that the reasons for adopting the sections continue to exist; however, revisions to the rules are necessary as the existing rules will be repealed and new rules proposed.

The department published a Notice of Intention to Review for §§297.1 - 297.6 regarding the agency review of rules in Government Code, §2001.039 in the *Texas Register* (27 TexReg 4745) on May 31, 2002. No comments were received by the department on this sections.

Mr. Alan Morris, Director, Toxic Substances Control Division (TSCD), has determined that for each year of the first five-year period the new sections are in effect, there will be no significant fiscal implications on state or local governments. There were no funds appropriated to the department for administering the sections, however, there will be some impact on the Indoor Air Quality Branch, TSCD, as the existing staff will be required to shift program priorities in order to educate stakeholders about the new guidelines, and respond to increased inquiries on the topic. Because these proposed guidelines are voluntary, i.e., governmental entities are not required to comply with the guidelines, specific costs to governmental entities cannot be determined. Each governmental entity can choose how much, if any, fiscal resources will be allocated to this. Costs could vary tremendously from one governmental entity to another that may choose to implement all or portions of the guidelines. Possible costs will depend upon the number of building facilities operated by a government entity, the present condition of the air quality in the affected buildings, the present or future resources in personnel, equipment, and available budget to allocate to improve IAQ, and the need or desire to improve IAQ. Many government entities already have programs in place to manage IAQ issues. Some may only refer to sections of the guidelines when they are faced with an IAQ problem.

Mr. Morris has also determined that for each year of the first five-year period that the new sections are in effect, the benefits to the public when governmental entities follow the guidelines and improve the IAQ could include a reduction in the incidence of health effects related to poor IAQ among the building occupants, resulting in a better working and learning environment, higher attendance, fewer illnesses, and increased productivity. Taking steps to manage IAQ should help preserve and improve the efficiency of the physical plant and equipment. As an example, large sums of money that are being spent by many government entities to clean up mold, for instance, could be saved in the future if steps are taken early on to prevent the conditions that allow such situations to develop. If IAQ problems are reduced, more cost effective use of resources could result. Furthermore, government entities that implement the guidelines have less potential of being closed or the occupants temporarily relocated due to serious IAQ problems. Improved relationships among administrations, building occupants, and parents of school children, reduced risk of negative publicity, and reduced potential liability could also result if the guidelines are followed. There will be minimal to no effect on micro-businesses or small businesses. There could be some positive benefits from selling additional products to improve the IAQ in government buildings, such as contractors, janitorial services, etc. There may be some negative impact on some businesses, such as property owners and property management companies from whom a government entity may lease office space, if IAQ considerations are in a lease agreement. There is no anticipated significant impact on local employment.

A 1996 United States General Accounting Office report to Congress indicated that 12% of the Texas schools that responded to a questionnaire survey had unsatisfactory IAQ and 16% had unsatisfactory ventilation. United States Environmental Protection Agency (EPA) studies of human exposure to air pollutants show that indoor levels of pollutants may be two to five times, and occasionally more than 100 times, higher than outdoor levels. Since most people spend about 90% of their time indoors, indoor air pollutant exposures are generally of greater concern

than outdoor pollutant exposures. The EPA and its Science Advisory Board have consistently ranked indoor air pollution among the top five environmental health risks to the public.

Poor indoor air quality (IAQ) can cause illness requiring absence from the workplace and school, and can cause acute health symptoms that decrease performance while at work or school. In addition, recent data suggest that poor IAQ can reduce a person's ability to perform specific mental tasks requiring concentration, calculation, or memory.

Air in most indoor environments contains a variety of particles and gaseous contaminants. These contaminants are commonly referred to as indoor pollutants when they affect human health and performance. Indoor temperature and relative humidity can also affect health and performance directly, and can affect human performance indirectly by influencing the airborne level of molds and bacteria.

Most often, poor indoor air quality results from the failure to follow practices that help create and maintain a healthy indoor environment. Common examples include failure to: control pollution sources such as art supplies and laboratory activities; control temperature and humidity; ventilate each workspace and classroom adequately; adequately perform housekeeping and maintenance operations; and the use integrated pest management to minimize the use of pesticides. Failure to deal adequately with any of these issues may go unnoticed, but can and often does take its toll on health, comfort, and performance.

Over the last ten years, the department has responded to hundreds of requests for assistance with IAQ problems in buildings owned or leased by state agencies, county, and city governments, and public school districts. Most of the requests were due to complaints that the indoor environment appeared to cause or contribute to health problems of the building occupants, including allergies, asthma, headaches, fatigue and irritation of the eyes or respiratory system. Many of the problems could have been prevented by providing adequate fresh outside air; using better cleaning, operational, and maintenance practices; preventing water intrusion in the building; using proper building materials and furnishings; and having better knowledge and concern about the causes of poor IAQ. Two independent surveys of major building tenants, conducted by the Building Owners and Managers Association (BOMA) and the International Facility Management Association (IFMA), place indoor air quality and component issues of thermal comfort and heating, ventilation, and air condition (HVAC) systems performance high on the list of major tenant complaints.

Pursuant to the Health and Safety Code, §385.002(b), the Texas Board of Health (board) considered four statutory criteria in establishing these guidelines: (1) the potential chronic effects of air contaminants on human health; (2) the potential effects of insufficient ventilation of the indoor environment on human health; (3) the potential costs of health care for the short-term and long-term effects on human health that may result from exposure to indoor air contaminants; and (4) the potential costs of compliance with a proposed guideline. The literature was reviewed regarding these four considerations, and some applicable information is summarized below.

1. The potential chronic effects of air contaminants on human health:

It is well documented that common indoor air contaminants that can/may be found in public buildings, (e.g., biological agents, such as molds, animal dander, and dust mites), volatile organic compounds known as VOCs (found in solvents and cleaning agents), formaldehyde, pesticides and combustion products) can cause chronic health effects. Biological agents in indoor air are known to cause three types of human disease: infections, where pathogens invade human tissues; hypersensitivity diseases, where specific activation of the immune system causes disease; and toxicoses, where biologically produced chemical toxins cause direct toxic effects. In addition, exposure to conditions conducive to biological contamination (e.g., dampness, water damage) has been related to nonspecific upper and lower respiratory symptoms. A major concern associated with exposure to biological pollutants is allergic reactions, which include rhinitis, nasal congestion, conjunctival inflammation, urticaria, and asthma.

Some of the documented health effects from VOCs and formaldehyde exposure include eye and upper respiratory irritation, rhinitis, nasal congestion, rash, pruritus, headache, nausea, vomiting, and dyspnea. Some VOCs are known carcinogens, (e.g., benzene) and many others are classified as probable and/or possible human carcinogens. The health effects from pesticide exposure include headache, dizziness, nausea, vomiting, and muscle weakness. Exposure to combustion products can cause headache, dizziness, nausea, emesis, tachycardia, wheezing and bronchial constriction.

It is important to realize that many health effects associated with indoor air quality problems are often non-specific symptoms, such as headaches, fatigue, allergy symptoms, and dizziness, rather than clearly defined illnesses. People with allergies, asthma, or damaged immune systems may be more susceptible to certain indoor contaminants. This is noteworthy, since there has been a significant increase in the prevalence of asthma in children in recent years. Asthma-related illness is one of the leading causes of school absenteeism, accounting for over ten million missed school days per year. Persons with asthma or other sensitivities may have reduced performance in the presence of environmental factors that trigger their asthma. There are also some people who appear to be more susceptible to indoor air contaminants, yet have no known underlying health condition.

2. The potential effects of insufficient ventilation of the indoor environment on human health:

Ventilation is the process of supplying and removing air by natural or mechanical means to and from any space. The air may or may not be conditioned. Insufficient ventilation means inadequate circulated air and/or outside fresh air in an occupied building. Acceptable indoor air quality is achieved within an occupied space by controlling known and specific contaminants. One of the least expensive and effective means of lowering the concentration of indoor air contaminants from non-localized sources, (such as the occupants themselves, building products and materials), is by dilution ventilation, i.e., adding outside fresh air to the recirculated building air. The lower the concentration of air contaminants, the less likely the chance that the occupants will experience adverse health effects. A study of student performance and carbon dioxide (CO_2) levels showed a correlation between high CO_2 levels and lower student performance on tests, including simple reaction time and choice reaction time on multiple choice tests. CO_2 levels can build up quickly in a crowded classroom with insufficient ventilation. Infectious diseases are more likely to be spread in indoor environments that are overcrowded and inadequately ventilated.

One study noted that as the ventilation rate decreases, the concentration of products generated from reactions between indoor pollutants increases. Many times these products are more toxic than the original air contaminants. For example, the air oxidation of limonene (found in many products containing oils of lemon, orange, caraway and dill) produces potent allergens. Another study attempted to show that increases in the supply of outdoor air did not appear to affect workers' perceptions of their office environment or their reporting of symptoms considered typical of the "sick building syndrome." However, this study was flawed in that the amount of outdoor air introduced into the buildings was two to three times the commonly recommended levels and there were no "sick" people in the study buildings to measure possible improvement of health effects. Also, while not a health consideration, another study found that insufficient ventilation with outside air led to concentrations of air contaminants that resulted in faster building equipment failures, such as corrosion of switch contacts.

3. The potential costs of health care for the short-term and long-term effects on human health that may result from exposure to indoor air contaminants:

A 1989 EPA study quantified some of the health care costs for the effects on human health that may result from exposure to indoor air contaminants. The study reviewed data on the following contaminants: radon, environmental tobacco smoke (ETS), biological contaminants, volatile organic compounds (VOCs), asbestos, combustion gases, and particulate matter. The annual direct medical costs of cancer caused by radon was $426 million; ETS, $274-$385 million; and for only six of the hundreds of VOCs, $25-$125 million. The study determined the annual non-cancer costs for ETS were $447-$516 million. The lost productivity costs for radon at $1,991 million and for ETS were $2,457-$2,974 million. The combined total cost for these air contaminants was between $5,713 and $6,880 million. The cost estimates developed for this study are incomplete and understated due to lack of complete information and are subject to great uncertainty. However, the study does conclude that the available evidence suggests the costs imposed by indoor air contaminants are very high.

Based on the review of the literature, the board believes that the following health effects could lead to significant medical costs for occupants of buildings with poor air quality: asthma in children from exposure to particulates and other lung irritants; pneumonia and other respiratory illnesses from exposure to biological contaminants and conditions conducive to biological contamination (e.g., dampness, water damage); and neurological damage and development of increased chemical sensitivity from exposure to neurotoxic chemicals. An estimated 17 million Americans suffer from asthma. In addition, about 5,000 deaths occur yearly from asthma - an increase of 33% in the last decade. Consequently, the social and economic costs are large. Among chronic diseases, asthma is the number one cause of absenteeism from school. Asthma cost an estimated $6.2 billion in the U.S. in 1990, including direct medical and indirect non-medical costs combined. An update of this figure would fall in the range of $7 to $9 billion in 1998 dollars.

4. The potential costs of compliance with a proposed guideline:

As these are voluntary indoor air quality guidelines, there is no requirement for compliance. Therefore, the cost may range from $0 if no compliance is done to the cost of the level of compliance implemented. As indicated earlier, the potential cost of voluntary compliance with a proposed guideline cannot be specifically determined due to the wide variation in the present indoor air quality of each government building. The cost to make selected improvements will depend upon each government entity's desire and ability to acquire funding to implement the voluntary guidelines. It is not the intent of the board or the department to require implementation of these guidelines, but rather to encourage the use of sound, cost-effective management practices to provide the best indoor air quality possible in government buildings. Testing for various indoor air contaminants when the samples require laboratory analysis can be very expensive and is only recommended if and when there is need to do so. The department encourages implementation of those portions of the guidelines that a governmental entity determines that it needs and can fund. The implementation of written policies and procedures to help prevent indoor air problems is encouraged. The department realizes that implementing these guidelines may take years, based on the availability of financial and other resources. Some entities that already have a proactive preventive maintenance program, may incur lower costs (probably in the thousands of dollars) to complete full implementation of the guidelines. Government buildings with very poor air quality where significant renovation and replacement of major equipment may be needed could incur costs of several hundreds of thousands of dollars. However, EPA and other studies have determined the health and productivity benefits of improved air quality in the workplace appear to always exceed the cost to implement improvements. Generally, the costs are recovered in a few months to a few years. Additionally, the costs of preventing indoor air quality problems are likely to be less than the costs of resolving problems after they develop.

There are tools available to assist building owners and operators with cost analyses, such as the U.S. EPA computer software program, I-BEAM (Indoor Air Quality Building Education and Assessment Model). This free program allows a user to document IAQ program activities, tally expenditures, and assess potential productivity and revenues impacts of an IAQ program.

In developing these guidelines, the board also considered the potential loss of productivity among workers and school children due to poor indoor air quality. EPA and other studies have estimated the cost of loss of productivity in the billions of dollars. One study indicated that thermal indoor conditions could reduce by 5% to 15% of human efficiency, such as in reading, thinking logically, and performing arithmetic. Loss of productivity in school children can affect their ability to learn and understand, which could have long term consequences on their ability to advance in school and to get better paying jobs.

Comments on the proposed sections may be submitted to Mr. Alan Morris, Director, Toxic Substances Control Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6600. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public hearing on the proposed sections will be held at 9:00 a.m., Friday, September 6, 2002, in the Texas Department of Health Auditorium, Room K100, 1100 West 49th Street, Austin, Texas.

Individuals needing additional information should contact Quade Stahl, Ph.D., Chief, Indoor Air Quality Branch, at (512) 834-6600 or (800) 572-5548. The hearing impaired may contact Ms. Suzzana Currier, ADA Coordinator at (512) 458-7627, toll free (888) 388-6332 or T.D.D. (877) 432-7232.

SUBCHAPTER A. PUBLIC SCHOOLS

25 TAC §§297.1 - 297.6

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

The repeals are proposed under the Health and Safety Code, §385.002, which provides the Texas Department of Health with the authority to establish voluntary guidelines for indoor air quality in government buildings, and §12.001, which provides the board with the authority to adopt rules for the performing of every duty imposed by law on the board, the department, and the Commissioner of Health.

The repeals affect the Health and Safety Code, Chapter 385.

§297.1. General Provisions.

§297.2. Definitions.

§297.3. Recommendations for Implementing a School IAQ Program.

§297.4. Design/Construction/Renovation.

§297.5. Building Operation and Maintenance Guidelines.

§297.6. Recommended Building Occupant Responsibilities.

This 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 July 26, 2002.

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Susan Steeg
General Counsel
Texas Department of Health
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SUBCHAPTER A. GOVERNMENT BUILDINGS

25 TAC §§297.1- 297.10

The new sections are proposed under the Health and Safety Code, §385.002, which provides the Texas Department of Health with the authority to establish voluntary guidelines for indoor air quality in government buildings, and §12.001, which provides the board with the authority to adopt rules for the performing of every duty imposed by law on the board, the department, and the Commissioner of Health.

The new sections affect the Health and Safety Code, Chapter 385.

§297.1. General Provisions.

(a) Purpose. Health and Safety Code, Chapter 385, Indoor Air Quality in Government Buildings, requires the Board of Health (board) to establish voluntary guidelines for indoor air quality (IAQ) in government buildings, including guidelines for ventilation and indoor air pollution control systems. The department developed these guidelines to promote practices that prevent or reduce the contamination of indoor air, thereby contributing to a safe, healthy, productive and comfortable environment for building occupants. Benefits of good IAQ may include improved health of occupants, decrease in the spread of infectious disease, protection of susceptible populations, increased productivity of occupants, improved relationships/fewer complaints, reduction in potential building closures and relocation of occupants, less deterioration of buildings and equipment, reduced maintenance costs, and decreased liability and risk.

(b) Scope. These are voluntary guidelines for government buildings. Only buildings that are enclosed on all sides from floor to ceiling by walls or windows (exclusive of door ways) that extend from the door to the ceiling are covered by these guidelines. Examples of governmental buildings include, but are not limited to, office buildings, public schools, public colleges, public universities, laboratories, dormitories, correctional facilities, courts, libraries, hospitals, warehouses, convention centers, sports facilities or any other building that is defined in this guideline as a government building. Open air parking garages and other facilities that are not enclosed are not covered by these guidelines. These guidelines are not intended to cover industrial-type activities in governmental buildings that are covered by occupational health and safety guidelines and standards unless these activities affect office, classroom, or other non-industrial occupied areas. Industrial-type activities would commonly be found in laboratories, maintenance shops, print shops, woodworking shops, or automotive maintenance and repair shops.

(1) The department does not have any enforcement authority requiring implementation of these guidelines. They do not create liability for a governmental entity for an injury caused by the failure to comply with the voluntary guidelines established by the board under Health and Safety Code, §385.002.

(2) Additional information on IAQ and a list of other resources for more information can be provided by the Indoor Air Quality Branch of the department. There are several resources available free of charge which offer guidance on the development of an IAQ Management Plan and which provide forms that can be used or modified to fit the needs of governmental buildings. These include the U.S. Environmental Protection Agency (EPA) publications, "Building Air Quality Action Plan and Building Air Quality: A Guide for Building Owners and Facility Managers, Indoor Air Quality Building Education Assessment Model (I-BEAM) Software" and "IAQ Tools for Schools" Action Kit. These resources are available on the Internet at www.epa.gov/iaq.

(3) The needs, costs and available funding for improving the IAQ vary greatly in different governmental entities. Governmental administrators should evaluate, and adopt or promote those guidelines that in their judgment are relevant, applicable and feasible to implement. It is important to realize that these guidelines are presented as a basic standard of practice that the department is encouraging governmental administrators to strive for.

(4) If portions of these guidelines conflict with any applicable building codes or other laws, then such laws take precedence over these guidelines. It is the responsibility of each governmental building administrator and other users of these guidelines to comply with applicable laws including but not limited to, those related to building, plumbing, electrical and mechanical systems, fire protection, safety, energy use and environmental protection.

(c) Severability. Should any section or subsection of this chapter be found to be void for any reason, such finding shall not affect all other sections.

§297.2. Definitions.

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

(1) Acceptable indoor air quality - The quality of air in an occupied enclosed space that is within an established temperature and humidity comfort zone, and which does not contain air contaminants

in sufficient concentration to produce a negative impact on the health and comfort of the occupants.

(2) Air contaminant - A gaseous, liquid, or solid substance or combination of substances in a form transported by or in air that has the potential to be detrimental to human health.

(3) ASHRAE - American Society of Heating, Refrigerating and Air-conditioning Engineers, Incorporated.

(4) Board - The Texas Board of Health.

(5) Building commissioning - The process of ensuring that all building systems are designed, installed, functionally tested, and operated in conformity with design intent. Commissioning includes planning, design, construction, start-up, testing, documentation, owner acceptance, and training throughout the life of the systems and building.

(6) Department - The Texas Department of Health.

(7) Government building - A building that is:

(A) owned, or leased for a term of at least three months, by a state governmental entity or by a political subdivision of this state, including a county, municipality, special purpose district, or school district; and

(B) regularly open to members of the public or used by the state or local governmental entity for a purpose that involves regular occupancy of the building by an employee or by a person in the custody or control of the governmental entity such as a public school student.

(8) HVAC system - The heating, ventilation, and air-conditioning system that provides the processes of comfort heating, ventilating and/or air conditioning within, or associated with, a building.

(9) IAQ - Indoor Air Quality. The attributes of the respirable atmosphere (climate) inside a building including gaseous composition, humidity, temperature, and contaminants.

(10) IAQ coordinator - A designated person who provides leadership and coordination of IAQ activities. The responsibilities should include coordination of an IAQ team, preparation for emergency responses, dissemination of IAQ information, tracking of IAQ complaints and direction of responses, and communication of IAQ issues and status to interested parties.

(11) IAQ management plan - A written plan for preventing and resolving IAQ problems.

(12) Indoor air pollution - The presence, in an indoor environment, of one or more air contaminants in sufficient concentration and of sufficient duration to be capable of causing irritation and/or adverse effects to human health.

(13) MERV - Minimum Efficiency Reporting Value. A number that reflects the filter efficiency based on the testing procedure defined in ASHRAE Standard 52.2-1999.

(14) Microbials - Agents derived from, or that are, living organisms (e.g., viruses, bacteria, fungi, and mammal, bird and dust mite antigens) that can be inhaled and can cause adverse health effects including allergic reactions, respiratory disorders, hypersensitivity disorders, and infectious diseases. Also referred to as "microbiologicals" or "biological contaminants."

(15) Negative pressure - A condition that exists when the air pressure in an enclosed space is less than that in the surrounding areas. Under this condition, if an opening exists between these locations, air will flow from surrounding areas into the negatively pressurized space. A negatively pressurized building will have airflow from the outside into the building through available openings.

(16) Occupied zone - the region within an occupied space between the planes three and 72 inches above the floor and more than two feet from the walls or fixed air-conditioning equipment (ASHRAE Standard 62-2001).

(17) Positive pressure - A condition that exists when the air pressure in an enclosed space is greater than that in the surrounding areas. Under this condition, if an opening exists between these locations, air will flow from the positively pressurized space into surrounding areas. A positively pressurized building will have air flow from the building to the outside through available openings.

(18) Preventive maintenance - Regular and systematic inspection, cleaning, and replacement of worn parts, materials and systems. Preventive maintenance helps to keep parts, materials, and systems from failing by ensuring they are in good working order.

(19) Public school - A building owned by a public school district or leased by a public school district for three months or more that is used by the district for a purpose that involves regular occupancy of the building by students.

(20) Qualified - Personnel possessing the necessary education, experience and equipment (where required) to accomplish the activities being performed. Certifications may be required for some regulated functions, such as asbestos and lead-based paint abatement.

(21) Recognized best practices - Those procedures that are considered by knowledgeable practitioners to be necessary to produce the most favorable results.

§297.3. Recommendations for Implementing a Governmental Building IAQ Program.

(a) Initial program development. The development of a governmental IAQ program should include the following considerations.

(1) IAQ coordinator. An IAQ coordinator should be appointed and trained to manage the IAQ program.

(2) Occupant considerations. Personnel evaluating facilities for indoor air quality should evaluate characteristics and activities of the population occupying and visiting the building, as these may indicate unique needs relating to indoor air quality. Examples of population parameters to consider would include but not be limited to: age, medical history, immune-compromised conditions (cancer, HIV or other), amount of time in building and activities performed by occupants.

(3) Facilities assessment. An IAQ and operational assessment of all facilities should be performed to identify and document building operations and problem areas based on original facility design intent and recognized codes and standards where available. Operational and maintenance needs that can be addressed immediately, and in the future, should also be identified and documented.

(4) Development of goals. Based on the results of the IAQ occupant needs and facility assessment, and resources available, each IAQ coordinator should develop goals, written plans and programs, which must be achieved for the implementation of an effective IAQ program.

(5) Governmental administrative support for stated goals. Administrative support from the highest level of the organization and a written commitment from the governmental entity and other key personnel to the goals are necessary for an effective IAQ program.

(6) Funding. Adequate budgets are necessary for IAQ and maintenance staff to meet the stated goals, plans and programs. The amounts of funding will vary based on the scope of each governmental program.

(7) Staff. An IAQ support team should be developed and trained as necessary to achieve the goals of the governmental entity. The team may include administrators, facility managers, health officials, custodians and maintenance personnel, an energy manager, design and construction staff, occupants, and others.

(b) IAQ management plan. A written IAQ management plan should be developed and maintained. The plan should include the following.

(1) Training. Education and training of the IAQ coordinator, support team, and building occupants on the recognition, prevention and resolution of IAQ problems.

(2) Communication. A procedure for communicating with building occupants regarding IAQ issues. Communication methods should be in writing utilizing any of the following methods: e-mail, posting in common areas visible to all employees, memo to each area of the facility. The notification should be posted at least five days prior to any activity (painting, dust-producing activities or other maintenance activities which may impact IAQ).

(3) Complaint response. A written procedure for documenting and responding to IAQ complaints and problems. The response procedure should include: instructions for obtaining information from complainants, assessing the urgency of the problem and appropriate action to follow, the communication plan for dissemination of information, investigating the complaint or seeking assistance to investigate the complaint as appropriate, deciding on the remedial actions to be implemented and by whom, assessing the effectiveness of the remedial action, and follow-up actions to check the long-term effectiveness of the remedial action or to monitor the recurrence of the original complaint, if no remedial action was performed. This procedure should define the forms that should be used to document and report all activities conducted in response to the complaint and their results.

(4) Record keeping. A written procedure that defines the minimum documentation to be collected, handling instructions and length of time for record retention in response to IAQ complaints, including any maintenance, repair or remodeling activities conducted in the building that could adversely impact the IAQ. Records retention rules specific for each agency should be followed.

(5) Maintenance and operation plan. A written building maintenance and operation plan containing: a written description of the building systems and functions, and occupancy, schematics and/or as-built drawings with equipment locations and performance criteria, outside air requirements, sequences of operation, daily building and system operation schedules, test and balance reports, maintenance schedules, building inspection checklists and maintenance equipment checklists. The plan should be updated and approved by the IAQ coordinator annually.

(6) Implementation schedule. A schedule to implement the IAQ plans and programs.

(7) Annual review. Annual IAQ inspection/review of facilities including a walk through by the IAQ coordinator or designee should be conducted.

(c) Administrative Review. A review of the IAQ program status and future needs should be presented annually to the appropriate governing body by the IAQ coordinator.

§297.4. Design/Construction/Renovation.

(a) Building design (new construction). The following factors should be considered during the planning and design stages.

(1) New buildings. Design and construction standards that facilitate the maintenance of acceptable IAQ should be established.

(2) Site selection. During the selection of building sites, consideration should be given to minimizing or designing to avoid potential contaminant sources. Some of these considerations include the following.

(A) Environmental assessment. A Phase I (visual inspection and condition measurements) environmental assessment of property to identify on-site contamination that could affect indoor air quality should be conducted.

(B) External contaminants. Potential external contaminant sources such as combustion sources (freeways or power plants), dust generators (agricultural or cement plants), and industrial plants that may emit pollutants into the air should be identified.

(C) Climate. Climate assessment data that include factors affecting building layout and other architectural design considerations such as elevation and prevailing winds should be developed and evaluated.

(D) Radon. A radon assessment of the site should be conducted, if applicable.

(E) Drainage. Conduct a drainage survey to assure water can be diverted from the building site and away from the building.

(3) Documentation. Facility design should include the development of owner's project requirement (the listing of facility uses, requirements and intent for the building), and basis of design (the design professional's description of the building elements and systems to accomplish the owner's project requirements) documents to guide the design and construction team in the selection of the least polluting materials and the production of a healthy building environment for the occupants. Some of the documentation and methods include:

(A) The design team should be assembled from qualified and licensed professionals that are knowledgeable in air quality issues.

(B) A building use and occupancy plan, schedule, and requirements should be assembled.

(C) An indoor pollutant source control plan should be developed to guide the materials usage, equipment selection and activities in the building.

(D) Comply with appropriate codes and standards.

(E) Assess the budget and schedule impacts of all materials and systems.

(F) A testing and commissioning plan should be developed to quantify the facility performance results required.

(G) Building operational and training documentation plans should be provided including the requirements for equipment systems manuals.

(4) Site and Facility Planning. The building design should consider the following.

(A) Building structure factors. Factors that can affect IAQ, such as the shape and size, orientation, layout, proximity to pollution-generating activities, building materials, types of windows and doors, ventilation system design, location of air intakes and exhausts, and susceptibility to pest intrusion should be considered.

(B) Internal contaminant sources. Proper venting to the outside atmosphere of pollution source areas, such as laboratories and preparation rooms, housekeeping and material storage, restrooms, workshops, cooking areas, art and hobby rooms, computer rooms, copy rooms, and other emission-producing spaces should be provided.

(C) Loading Docks. Loading docks should be designed such that vehicle exhaust shall be prevented from entering enclosed work spaces (including air intakes and building openings) by installing barriers to airflow from loading dock areas (i.e. doors, curtains, etc.) and using pressurization. Outside air intakes should not be near or above truck or other vehicle access areas.

(D) Moisture prevention. Condensation, water vapor intrusion, and other moisture problems in the building should be avoided through the proper design and installation of the building components. The use of vapor barriers (membrane inserted in a wall assembly to reduce moisture flow) should be based on best practices design for the local area. Care should be taken not to have two vapor barriers in one wall such as an exterior barrier with vinyl wall covering on the inside. In hot and humid climates, vinyl wall covering should not be used on exterior walls to avoid condensation and mold growth behind the covering.

(E) Space allocation.

(i) Adequate space for maintenance access and proper operation of building equipment, such as HVAC system equipment and boilers, should be provided.

(ii) Separate designated rooms used for materials and chemical storage only and that are kept under negative pressure and vented to the outside atmosphere should be provided.

(F) Building materials, interior finishes, and furnishings.

(i) The lowest chemical-emitting building materials, interior finishes, and furnishings that are practical should be used. Contaminant-emitting and retention potential of furnishings, floor and wall coverings and casework, and other interior finishes should be evaluated. Emissions data from manufacturers should be evaluated before specifying or approving construction products and building furnishings.

(ii) Materials that prevent (or at least inhibit) microbial growth without occupant exposure to potentially harmful chemicals should be used.

(iii) The use of porous or fleecy materials is discouraged where unmanaged excessive moisture or improper maintenance could occur.

(iv) Projected life cycles of materials and equipment should be considered to provide the most sustainable construction.

(v) Recycling of construction waste and materials from remodeled facilities should be provided where possible.

(vi) Maintenance requirements should be considered. Materials that can be easily cleaned with the least toxic cleaning supplies should be utilized when possible.

(vii) Building materials and products susceptible to water damage should be properly stored and protected to prevent damage before or during construction phase.

(5) HVAC system design. HVAC systems should be designed to include the following.

(A) Air intakes. Sufficient acceptable outside air to maintain a healthy environment in all occupied areas should be provided. (Reference ASHRAE Standard 62-2001). Preconditioning of outside air supplies is recommended where possible.

(B) Air distribution. Proper air distribution should be provided to all occupied areas.

(C) Filters. Medium to high efficiency (MERV 9 - 11) filtering systems should be used. Air handlers should be designed and selected to accommodate the pressure drops required for adequate filtration. Low capacity systems may use lower efficient filters (MERV 6 - 8) if it cannot be retrofitted for the more efficient filters. Filters should be installed to minimize air bypass around the filters and maintained per the manufacturer's recommendations.

(D) Access doors/ports. Convenient access doors/ports to facilitate inspection, maintenance and cleaning of air handling units and ducts should be provided.

(E) Coils. Coils with adequate heating and/or cooling capacity and with features to facilitate maintenance should be used.

(F) Drain pans. Insulated drain pans with proper slope and drainage to prevent standing water should be installed on all new cooling (wet) coils.

(G) Drain traps. Drain traps should be properly installed when drain lines from condensate pans connect to sewer systems.

(H) Ducts. Ducts with internal surfaces that are easily cleaned, not damaged by typical cleaning methods, do not harbor dust and microbials, and that will not emit materials or gases that can harm the occupants should be provided on all new HVAC systems.

(I) Return air. Ducting of return air is recommended.

(J) Positive building pressure. The rooms of the buildings should be maintained at a net positive pressure (minimum of 1 Pascal) with respect to the outside atmospheric pressure. Some areas in buildings that have isolation or process requirements, such as print shops, darkrooms, and restrooms, may require defined pressure relationships to adjacent areas.

(K) Exhaust systems. Adequate exhaust systems for restrooms, storage rooms, copy rooms, animal areas, chemistry labs, computer rooms, industrial arts rooms, kilns, home economics rooms, locker rooms/showers, swimming pools and other areas with contaminant sources should be provided. These areas should be under negative pressure with espect to adjacent areas, such as classrooms, offices and hallways.

(i) Exhausts should be vented directly to the outside.

(ii) Exhaust vents should be located to avoid contaminants being drawn back into the building and no closer than 25 feet from an air intake.

(L) Comfort. Adequate temperature and humidity control with prior air velocity should be provided to maintain comfort, process requirements, and minimize microbials and contaminants in all occupied areas.

(M) Humidity. The maximum relative humidity should be maintained below 60% throughout the year to prevent mold growth. Ideal relative humidity levels are generally between 30% and 60%, however between levels 30% and 50% will decrease the chance of mold growth. In climates where outdoor humidity levels are often less than 30% and building occupants do not complain of health effects or discomfort from the lower humidity, then lower humidity inside buildings is acceptable.

(N) Air diffusers. Air diffusers should be used to manage air flow volumes, mixing, and patterns for occupant comfort. Normal occupied spaces should have an average air velocity between 20 and 50 feet per minute in the occupied zone.

(O) Controls. Proper controls and energy management systems should be installed to maintain recommended interior conditions. Thermostats in each occupied room and conference room are preferred.

(b) Maintaining acceptable IAQ during renovation. Building occupants should be protected from fumes and dust during renovation.

(1) Asbestos Survey. Prior to any renovation or dismantling, assure that the asbestos surveys for the building in question are up-to-date. If such survey information is not available, engage a licensed asbestos consultant or other licensed professional to conduct an asbestos survey and plan for the building as per the Texas Asbestos Health Protection Act, Article 4477-3a, V.T.C.S. and Rules, §§295.31-295.73 of this title (relating to Texas Asbestos Health Protection Act), and the National Emission Standards for Hazardous Air Pollutants, 40 CFR 61 Subpart M, National Emission Standards for Asbestos.

(2) Lead-based paint concerns. Lead-based paint, used in many buildings built prior to 1978, may create an exposure risk for young children occupying or visiting the building, if the paint is deteriorating or is disturbed. Prior to any renovation or remodeling project in such a facility that is occupied or frequented by young children, a lead inspection by a state-certified person to determine the presence of lead-based paint is recommended, if the presence of such has not already been determined. If lead-based paint will be disturbed during a renovation or remodeling project, lead-safe work practices should be used to avoid unnecessary lead exposure to workers and building occupants. In a "child-occupied facility" as defined in §295.202 of this title (relating to Definitions), any "lead based paint activity", i.e. lead inspection, risk assessment or abatement, must be conducted in accordance with the Texas Environmental Lead Reduction rules, §295.201 of this title (relating to General Provisions).

(3) The IAQ Coordinator should review designs and construction activities for all proposed remodeling and renovation activities prior to their initiation.

(4) Minimize volatile organic compounds (VOCs) by purchase and use of low-emitting products, such as paints, varnishes, building materials, furnishings, etc., and processes (wet-sanding drywall). Minimize emissions from new furnishings by airing out the product before installation. Water-based solvents, when available, are preferred.

(5) Hazardous chemicals and substances. Hazardous chemicals as defined in the Health and Safety Code, §502.003 and hazardous substances as defined in the Health and Safety Code, §361.003, should be managed and disposed of in accordance with all applicable state and federal laws.

(6) Scheduling. Occupant exposure to contaminants should be minimized by scheduling renovations that may produce contaminants or uncomfortable conditions when the building is unoccupied.

(7) Isolation. Ventilation and barrier control strategies to isolate construction areas from the occupied areas should be used. Increase ventilation in occupied areas if necessary to control odors from construction area. The area of renovation should be kept under a negative pressure relative to occupied areas during renovation periods.

(8) Remediation of toxic contaminants. Procedures appropriate for toxic contaminants (lead, microbial, asbestos, hazardous chemical, etc.) should be utilized if such contaminants are expected or discovered during renovation and in some cases must be utilized under state and federal law.

(9) Filters. Filters should be changed more frequently during contaminant- generating activities, and also replaced after work is completed.

(10) HVAC equipment. Ensure that HVAC equipment is protected from damage and entry of contaminants.

(11) Water-damage. Porous building supplies that become water-damaged should be discarded to avoid to potential for mold contamination.

(12) Re-occupancy. All renovated areas should be thoroughly cleaned utilizing high-efficiency particulate air (HEPA) filtered vacuuming and adequately ventilated prior to re-occupancy.

(c) HVAC system testing. For new construction and major remodeling, the HVAC systems in those areas should be tested and balanced by an independent certified contractor at the completion of construction or remodeling.

(d) Commissioning of building. Building commissioning of new and/or renovated buildings should be provided by a trained and knowledgeable commissioning authority according to recognized national standards to assure proper operation of all building systems.

(e) Design Documentation. Design documentation including the owner's project requirements (design intent), and basis of design should be retained for the life of the facility. As-built documents should be prepared during construction and retained at the facility.

(f) Monitoring activities. Construction and renovation activities should be monitored by the owner's representative, facility IAQ coordinator, and commissioning authority.

(g) Ventilation Protocols. Ventilation protocols should be developed to include proper area exhaust rates and pressurization requirements to be used during initial occupancy, repairing and remodeling.

§297.5. Building Operation and Maintenance Guidelines.

(a) Written preventive maintenance program. A written preventive maintenance program should be established for each public building to provide a healthy environment. The program should include procedures for the following.

(1) HVAC Systems

(A) Filters. A system filter change-out program should be developed and implemented. A filter upgrade program should be implemented if the filters do not meet the latest recommended efficiency of MERV 9 or higher. Some low capacity air handlers may only have sufficient capacity to utilize MERV 6 filters.

(B) Coils and condensate drain systems. A cleaning program of the coil and condensate drain systems of the HVAC systems should be developed and implemented.

(C) Cleanliness. The air supply and return systems and mechanical rooms should be kept clean and properly maintained.

(2) Sewer traps. A sewer trap maintenance program should be developed and implemented to prevent sewer gas back drafts into buildings.

(3) Emergency response plan. An emergency response plan for water leaks and other contaminant problems should be developed and utilized.

(4) Records. A written maintenance record program should be developed and implemented.

(5) Maintenance requirements. Adherence to product manufacturers' maintenance requirements should be required as a minimum.

(6) Recommissioning. Scheduled recommissioning of the facilities should be conducted to facilitate efficient and healthy building operations.

(b) Training. Personnel should be educated and trained in the prevention, recognition, and resolution of IAQ concerns.

(c) Scheduling maintenance. Schedule and conduct maintenance activities that could produce high emissions (painting, roofing repair, pesticide applications) to minimize occupant exposure to indoor air contaminants. Develop and utilize effective ventilation protocols based on system capabilities, occupancy, and contaminant characteristics for each facility and operation. Increase ventilation in occupied areas as necessary to control odors.

(d) Housekeeping.

(1) Custodial program. A written custodial program should be developed with specified cleaning procedures, schedules, quality levels, and chemicals allowed for each facility.

(2) Storage. Storage and janitorial rooms should be kept clean and properly maintained. Air handling rooms should not be used for storage.

(3) Supplies. Maintenance and operational supplies should be kept in order and properly labeled in a clean, dry room to prevent contamination of the air and infestation of insects and rodents. Material safety data sheets (MSDS) for all products should be readily accessible.

(4) Cleaning procedures. Cleaning procedures and equipment should be selected to be effective and to minimize airborne dust.

(e) Tobacco Products. The use of any smoking tobacco products or smokeless tobacco products by employees or visitors should be prohibited in government buildings, within twenty feet of any entrance, and within twenty feet of the building's fresh air intakes. The use of such tobacco products should be permitted only in outside areas that have been designated for "Tobacco Product Use."

(f) HVAC systems.

(1) Outside air. The HVAC systems should be operated to provide acceptable outside air with quantities in conformance with the most current and accepted standard, such as ASHRAE Standard 62, up to the equipment capabilities. Proper operation and flow rates should be verified annually. The outside intake should be covered with a grill to prevent insects or birds from entering. In humid areas, the outside air should be humidity-controlled if the outside air is vented directly into occupied spaces, is continuously left running, or the HVAC unit cannot handle the humidity load on very hot and humid days.

(2) Positive pressure. The HVAC systems should be operated to provide a positive building pressure to significantly reduce the entry of outside contaminants, and provide more effective temperature and humidity control.

(3) Moisture control. The HVAC systems should be operated to prevent excessive moisture that could cause microbial growth or high humidity.

(4) Ducts.

(A) Inspection. Periodic (annually is recommended) visual inspection of ducts for mold, dirt and deterioration should be performed.

(B) Cleaning. Routine cleaning of ducts in well-maintained systems (i.e. systems that are sealed properly, have high efficiency filters that are correctly installed, and are being maintained per the manufacturers' instructions) is rarely required. Cleaning of ducts internally lined with fibrous or soft material that can be damaged by mechanical cleaning devices is discouraged. Replacement of these types of contaminated lined ducts is preferred. If need is indicated, the ducts should be cleaned using methods that will not expose occupants to potentially harmful substances. Where applicable, the National Air Duct Cleaning Association standards are recommended. The use of "blown in" chemicals to clean, seal or sanitize ductwork is discouraged.

(C) Replacement. When a duct is repaired or replaced, those with internal surfaces that are easily cleaned, not damaged by typical cleaning methods, do not harbor dust and microbials, and that will not emit materials or gases that can harm the occupants should be used.

(5) Drain pans. Condensate drain systems should be free of microbial growth and other debris. The condensate pan should drain completely so there is no standing water. The use of unregistered chemicals in the drain pans or on the coils to reduce mold growth that could cause air quality problems for the occupants is discouraged.

(6) Exhaust air. Exhaust air systems should be operating properly and vented to the outside. Proper operation and flow rates should be verified annually.

(7) Preconditioning. The HVAC systems should be operated for sufficient time prior to building occupancy to remove contaminants and to condition the air.

(8) Access. If existing access to the HVAC systems does not allow proper inspection and maintenance, access ports, preferably hinged with good seals and latch(es), should be installed.

(9) Responsibility. Assignment of responsibilities for maintenance and operations of all areas and systems is essential to an indoor air quality program.

(10) Documentation. Documentation provided by design, construction and renovation projects must be maintained and updated.

(11) Standards. Maintenance standards should be developed and maintained for all systems and operations.

(g) Microbial management. The control of the conditions that allow or encourage microbial growth should be a primary objective of building operations and maintenance.

(1) Water intrusion. Damaged building systems or components that cause water condensation or water leaks in the building should be promptly repaired. Inspect the building for evidence of water damage and visible mold growth and promptly correct the problem. Areas that go unattended can soon become major problem areas.

(2) Water damage. Porous materials that cannot be dried within 24-48 hours usually cannot be saved without great expense. Remove and dispose of water- damaged porous materials, such as sheetrock, fiberglass or cellulose insulation, carpets, mattresses, pillows, upholstered furniture, papers, and books. If water damage is from floodwaters that may contain sewage or from sewage backup, the water-damaged porous materials should be replaced and special cleaning is required for all hard surfaces. If large areas are water-damaged, desiccants and/or dehumidifiers may be necessary to remove excess humidity and prevent mold growth.

(3) Cleaning/replacement. Promptly clean or replace materials contaminated with mold or other microbials. Contaminated porous materials should be replaced. Take precautions to prevent exposures to workers/occupants when cleaning and/or disinfecting with chemicals. When removing contaminated materials, handle the material carefully and gently to avoid dispersion of contaminant, and

bag the material prior to removal from contamination site to prevent further contamination of adjacent areas.

(4) Construction, operation and maintenance. To prevent microbial growth: exhaust the air directly to the outside in high moisture areas; prevent condensation on cold surfaces (i.e. windows, piping, exterior walls, roof or floors) by adding insulation, raising the temperature and increasing circulation; maintain relative humidity between 30-50% if possible; do not install carpet in areas where there is a potential moisture problem; and check the installation and operation of moisture barriers, weep holes, HVAC systems, roof, windows, and vents.

(5) Water systems. Ensure that the following water systems are built, operated and maintained to prevent the growth of *Legionella* and other microorganisms that can become airborne: potable water systems, emergency water systems, heated spas, whirlpool baths, drip pans, architectural fountains, waterfall systems, cooling towers, fluid coolers, evaporative condensers, direct evaporative air coolers, misters, air washers and humidifiers. Treatment for these systems includes the use of chemicals, ionization and/or heat, depending on the system. Addition guidance can be found in ASHRAE Guideline 12-2000 "Minimizing the Risk of Legionellosis Associated with Building Water Systems."

(6) Pest, bird and animal control.

(A) Prevent entry. Pests, birds, bats, rodents and other wild animals should not be allowed to roost in or enter occupied buildings, including attics, plenums or in or near fresh air intakes, as they may carry disease and/or produce conditions conducive to the growth of disease-causing microbials. Professional assistance may be necessary for the removal of potentially dangerous live animals or if the area is heavily infested.

(B) Contamination. Areas contaminated with animal urine, feces, nesting materials, etc. should be decontaminated, i.e., physical removal of waste and disinfecting of the area. Protection for building occupants and workers should be required during the process.

(7) Remediation. Microbial contamination on surfaces or in water reservoirs is unacceptable and should be removed by qualified personnel according to guidelines and standards to avoid dissemination and worker/occupant exposure. Appropriate steps should be taken to prevent future growth in these locations, without causing occupant exposure to potentially harmful chemicals.

(8) Sewage backups. Building occupants should be removed from any area flooded by sewage. The cleanup should ensure rapid decontamination (to include water extraction, cleaning and disinfecting) and drying of all wet surfaces. Contaminated porous materials should be replaced, preferably with non-porous materials.

(h) Animals. If building activities require or allow certain animals in the building, ensure that they are in a controlled area with proper ventilation, are contained in enclosures that can easily be cleaned and that all animal waste is removed daily.

(i) Plants. Plants should be maintained in a healthy and clean condition. Plants that have been over-watered, over-fertilized, or have insect infestations contribute to poor air quality. The benefits of well-maintained plants in improving indoor air quality are insignificant in large areas or buildings.

(j) Loading dock operation. Vehicle exhaust should be prevented from entering enclosed work spaces (including air intakes and building openings) by installing barriers to airflow from loading dock areas (i.e. doors, curtains, etc.) and using pressurization.

(k) Remediation of contaminants. Use the appropriate procedures for the removal of toxic contaminants of concern (lead, microbial, asbestos, chemical, etc.) when performing maintenance, repairs or remediation. Refer to applicable state and federal laws.

(l) Cleaning products.

(1) Toxicity. The least toxic cleaning products needed to accomplish the task should be used.

(2) Directions. Follow manufacturer's directions for cleaning products. The use of excessive amounts of cleaning materials can cause unacceptable IAQ.

(3) Training. Assure that all personnel using cleaning products and hazardous chemicals have been trained in the proper usage and handling of such products as required by the Texas Hazard Communication Act, the Health and Safety Code, §502.010.

(4) Labeling. The employer shall follow the labeling requirements of the Health and Safety Code, §502.007.

(5) Ventilation. Adequate ventilation during and immediately after use of cleaning products should be used to minimize exposure to potentially harmful or irritating substances in the products.

(6) Scheduling. Schedule the use of cleaning products when building is unoccupied to minimize exposure to students, staff and other occupants.

(m) Pesticide use.

(1) Management. Pest management, for both building and lawn care, should emphasize non-chemical management strategies whenever practical, and least toxic chemical controls when pesticides are needed.

(2) Products. Pest control products used in and around a building should be documented and a Material Safety Data Sheet (MSDS) made available for building occupant review if requested. Either a written procedure or contract language will ensure that people who use pest control products read and follow all label directions for proper use, mixing, storage, and disposal.

(3) Statutes. Pest management for schools must be in accordance with the Structural Pest Control Act, Texas Revised Civil Statutes, Article 135b-6, §4J and 22 Texas Administrative Code, §595.11 (relating to Schools). These protocols are recommended for all other government buildings.

(4) Contracting. When contracting for pest control services, the use of businesses that conform to the standards set forth in 22 Texas Administrative Code, §595.14 (relating to Reduced Impact Pest Control Service) is recommended.

(5) Removal. Dead pests should be promptly removed from the premises.

(n) Emergencies. An emergency response plan, including staff training, should be developed for chemical spills, release of hazardous air contaminants, and similar events. Such response measures may be required by state or federal law in some circumstances.

(1) Ventilation. The required outside ventilation air rate should not be interrupted during building operation unless a known contaminant presents an immediate concern of entering the building. Consider the use of high efficiency and carbon-filtered outdoor air to improve general IAQ and reduce potential impact of intentionally released contaminants. Outdoor air intakes should be able to be closed manually in case of an intentional release of contaminants outside.

(2) Airborne Chemical, Biological, or Radiological Attacks. Guidance is available from the United States Department of Health and Human Services (DHHS): "Guidance for Protecting

Building Environments from Airborne Chemical, Biological, or Radiological Attacks," DHHS (NIOSH) Publication No. 2002-139.

(o) Records.

(1) Material safety data sheets. A public employer shall maintain a legible copy of the current Material Safety Data Sheet for each hazardous chemical used or brought into the workplace including those in cleaning supplies, pesticides and art supplies in accordance with the Health and Safety Code, §502.006.

(2) Workplace chemical list. The employer shall prepare a workplace chemical list if required by the Health and Safety Code, §502.005.

(3) Facility chemical list. The employer shall prepare a facility chemical list (also known as a Tier Two report) if required by the Health and Safety Code §506.006.

§297.6. Recommended Building Occupant Responsibilities.

(a) Cleanliness. Offices, classrooms, workrooms, mechanical rooms and supply areas should be kept clean and orderly to prevent contamination of indoor air and conditions conducive to insect or rodent infestations.

(b) Product usage. Products such as pesticides, air fresheners (including plug-ins), scented products (including candles), spray products, and other materials that may be a health concern, should not be used.

(c) Work activities. Use the least toxic instructional or work materials (markers, glue, art supplies, etc.) that will serve the intended purpose. When activities/projects generate air pollutants, steps should be taken to minimize impact, such as using local exhaust fans or opening windows.

(d) Diffusers and grills. Supply air diffusers and return air grills should be kept free and clear of any obstructions.

(e) Mechanical Rooms. Mechanical rooms and/or closets housing HVAC systems should not be used for storage.

(f) Spills. Spills should be cleaned up promptly and properly. Materials to cleanup the spills of hazardous chemicals must be disposed of in accordance with all applicable state and federal laws.

(g) Pets. Animals should be maintained in such a manner to prevent IAQ problems.

(h) Sensitive individuals. Carefully consider and, to the extent feasible, accommodate the needs of sensitive individuals by the following.

(1) Consulting. Individuals with allergies or chemical intolerances should consult, as necessary, with health officials, and their physicians.

(2) Locating. Locate sensitive individuals away from potential sources of symptom-triggering substances and activities.

(3) Discouraging. Discourage the use of scented personal care products or other scented products that may cause adverse reaction in sensitive individuals.

(i) Food. Food should be stored in airtight containers and refrigerated if necessary.

(j) Garbage. Waste containers should be stored properly, emptied regularly, and located away from air intakes or other sensitive areas.

(k) Tobacco Policy. Employees and visitors entering a government building will abide by the building's written "Tobacco Policy."

(l) Portable air cleaning devices. Portable air cleaning filtration devices may be of limited help in cleaning a small area. They must be properly maintained to be beneficial.

(m) Ozone-generating devices. Ozone-generating devices should not be used in occupied spaces. Ozone is a lung irritant.

(n) Reporting. Promptly report IAQ problems/complaints to the IAQ coordinator or designee.

(o) Medical care. Any building occupant experiencing chronic or serious health problems is encouraged to seek appropriate medical care, and work with medical professional(s) to manage the illness.

§297.7. Assessing and Resolving IAQ Problems.

(a) A written plan should be developed as part of the building indoor air quality plan to include specific steps for investigating and resolving IAQ problems. Each facility or governmental entity should decide when and if investigations will be handled by in-house staff or if outside assistance is needed.

(b) Complaint response. All IAQ complaints should be acknowledged and investigated as quickly as possible. A written record should be kept of the complaint, investigation findings and resolution.

(c) Information gathering. The person(s) complaining or reporting an IAQ situation should be interviewed by a trained IAQ coordinator or qualified individual to gather as much information as possible. This information should include the nature of the complaint, the timing, complainant's symptoms, health effects, observed conditions at time of symptoms, such as odors, weather, occupant activities, and specific location(s) of problem(s). If several people and locations are involved, an occupant questionnaire can be used to help determine if the problem covers a specific location or is throughout most of an area or building, and if there are one or more problems. Results of the questionnaire may also be used to compare with building drawings to locate causes of the problem(s) and sources.

(d) On-site inspection. The complaint area should be inspected to locate any problem conditions or materials. Measuring temperature and humidity is recommended. Any visible microbial, chemical or material contamination sources, including the presence of odors, should be noted. During the inspection, the information gathered from the interviews should be compared with possible health effects of various contaminants and their sources, such as listed in Table 1, in §297.8(b), to aid in determining possible sources and contaminants to look for in the problem and related areas.

(e) HVAC system. The operation and condition of the HVAC system should be verified to ensure that adequate acceptable outside air provisions are being met. Check for drafts or stagnant areas. Check whether the layout of air supplies, returns, and exhausts promotes efficient air distribution to all occupants and isolates or dilutes contaminants. Check for short circuiting, airflow patterns and air velocity in occupied zone. Possible exterior contamination sources, such as vehicle exhausts, maintenance and construction operations and levels of natural exterior allergens should be noted.

(f) Resolution. Resolution of problem conditions determined as a result of occupant interviews and on-site inspections are often the only actions needed to resolve the complaint.

(g) Testing. Performing tests for contaminants of concern and factors affecting IAQ, unless conducted at the time of exposure, are unlikely to locate or measure a transient condition, and are not recommended for most investigations. If specific conditions are suspected and a need for verification testing is required, based on the visual inspection, health symptoms, clinical data and contents, and practices of the facility, then appropriate test methods should be performed by

qualified personnel. Laboratory analysis of samples, where required, should be completed by certified organizations. Equipment utilized in the evaluation procedures should be calibrated according to manufacturers' recommendations and the sampling methods utilized. Outdoor samples may be needed for comparison with indoor samples for some conditions, such as temperature and relative humidity, and some contaminants, such as carbon dioxide and air-borne mold.

(h) Evaluating data and exposures.

(1) Before any sample collection, a standard of comparison and/or recognized acceptable standards should be selected. (i.e., carbon dioxide 700 ppm above outside level).

(2) Compare samples collected to standards established by the same testing methods.

(3) Compare indoor and outdoor sample results if appropriate.

(4) Compare sample results to the symptoms and complaints using standard toxicological procedures.

(i) Remediation. If suspected or other contaminants are identified, perform any necessary remediation using established and appropriate control methods for the situation.

(j) Communication. Any perception by building occupants that management is withholding information about an indoor air problem can be very damaging. Steps should be taken to ensure that up-to-date information is provided to building occupants and other concerned parties regarding any on-going IAQ investigations, survey results, planned repairs or remediation projects.

(k) Hiring professional assistance.

(1) Professional companies or contractors hired to solve, prevent, or control IAQ problems should provide evidence of meeting minimum criteria, to include at least:

(A) Education. The contractor should provide evidence of having obtained formal education appropriate to the scope of their professional expertise.

(B) Training. The contractor should provide a record of appropriate training in IAQ issues, as appropriate.

(C) Licensure. Contractors performing services that require licensure, such as physicians, engineers, architects, lawyers, asbestos or lead abatement contractors, and similar categories, should provide proof of licensure.

(D) Experience history. The contractor should provide verifiable references for at least five projects of similar size and scope.

(E) Compliance history. The contractor should provide a list of all compliance actions initiated by the U.S. EPA, U.S. Occupational Safety and Health Administration, the Department, the Texas Commission on Environmental Quality (formerly the Texas Natural Resources Conservation Commission) or similar local agencies that are applicable to the job.

(F) Proof of insurance. The contractor should provide proof of insurance that includes general liability and/or errors and omissions coverage, as appropriate, to cover the job.

(G) Equipment. The contractor should have knowledge and skill to use the proper testing and inspection equipment needed to perform the job.

(2) Avoid conflicts of interest. Ensure that contractors are not in a position of (or the appearance of) creating work for themselves, nor inspecting or approving their own work.

§297.8. Guidelines for Comfort and Minimum Risk Levels.

(a) IAQ Comfort. Comfort is an important part of indoor air quality. The major comfort issue is thermal comfort that involves temperature, relative humidity, and air velocity. Other comfort issues not covered here but that could affect the indoor environment are lighting, noise, and vibration. Maintaining the proper temperature range is not sufficient to achieve thermal comfort; it is also necessary to properly control the combination of temperature, relative humidity and air velocity.

(1) Temperature. The room temperature for a typical occupied office or classroom environment should be kept between 70 to 76 degrees Fahrenheit and controlled within a temperature range of ±2 degrees Fahrenheit for a given day. Temperature at body and head height and near the floor needs to be considered. Occupant preferences, activity and attire will influence the comfort. Additional guidance documents for other situations are available, including ASHRAE Standard 55-1992 and 55a-1995.

(2) Relative Humidity. The relative humidity for a typical occupied office or classroom environment should be generally between 30 to 50%. The relative humidity should never exceed 60% due to potential mold growth. In geographical regions where the outdoor relative humidity is typically below 30%, no humidification is recommended if the occupants do not complain of discomfort due to the dryness.

(3) Air Velocity. Some air movement is recommended to avoid a feeling of stagnant air, typically 25 to 55 feet per min (fpm). Higher air speeds may be acceptable if the affected occupants have control of local air speeds. Air supplied to the occupied zone (standing and sitting positions) should be supplied at a moderate velocity within the recommended temperature and relative humidity ranges. Air supplied from a diffuser at elevated speeds can create drafts in the occupied zone, causing complaints of too hot or too cold, dry eyes, sore throats and nasal irritation. Directing diffusers directly onto occupants' work zones or directly overhead may cause occupants discomfort, resulting in them "modifying" the supply system (e.g., placing cardboard over diffusers). The system should be properly tested and balanced. The appropriate supply and exhaust diffusers based on the occupant locations should be installed. These diffusers should supply air at an acceptable temperature and humidity. Additional guidance documents are available, including ASHRAE Standard 55-1992 and 55a-1995.

(b) Minimum Risk Levels. Table 1 in paragraph (4) of this subsection provides Minimum Risk Levels (MRLs) for common contaminants found in indoor air. The MRLs in Table 1 are not IAQ standards. There are no required federal or Texas standards for indoor air contaminants. The MRLs are based on the data contained in the Texas Commission on Environmental Quality's (formerly the Texas Natural Resources Conservation Commission) Effects Screening Levels List (July 19, 2000), the Agency for Toxic Substances and Disease Registry's (ATSDR) Minimal Risk Levels for Hazardous Substances (December 2001), and the Environmental Protection Agency's (EPA) Integrated Risk Information System (IRIS) inhalation RfC values and the National Primary and Secondary Air Quality Standards (40 CFR 50). These information sources can be used as a reference for other contaminants not listed in Table 1.

(1) These levels are based on inhalation for an eight (8) hour exposure for the general public. If a particular contaminant is expected to last significantly longer, the MRL should be lowered to compensate for the longer duration. The references below may have this information. For one year, a reasonable approximation is to multiply the 8-hour MRL by 0.14.

(2) Most of the MRLs are at a no-observed-adverse-effect-level. They are set below levels that, based on current information,

might cause adverse health effects in the people most sensitive to such substance-induced effects. If the indoor levels of contaminants in air exceed the MRL, it does not necessarily indicate a problem, but should trigger a concern for a more in-depth evaluation of the potential health effects or to reduce the concentration below the MRL. Most of the MRLs are based on non-cancer health effects only.

(3) The MRLs are expressed in units of parts per million (ppm) for most gases and volatiles, or milligrams per cubic meter (mg/m3) for particles and some volatile organic compounds (VOCs).

(4) Table 1. Common Indoor Air Conditions/Contaminates in Government Buildings.
Figure: 25 TAC §297.8(b)(4).

§297.9. Lease Agreements.

This document, The Voluntary Indoor Air Quality Guidelines for Government Buildings, should be a required part of the lease agreement whenever a government entity leases from or to another public or private entity. The property owner/property management should comply with all applicable sections of these guidelines if specified in the lease.

§297.10. Special Considerations.

(a) Hospital facilities. Refer to Texas Department of Health, Hospital Licensing, Physical Plant and Construction Requirements, New Construction Requirements, (25 Texas Administrative Code, §133.162) (the Texas Hospital Licensing Law, Health and Safety Code Chapter 241), regarding ventilation requirements, general mechanical requirements, performance and acceptance of hospital facilities, and HVAC requirements, (25 Texas Administrative Code, §133.169).

(b) Correctional facilities. When correctional facilities consider these guidelines, they must also consider compliance with all of the regulations that may affect their mission to protect the general population by securely housing the criminal offenders of the State. Security issues or the original structure of some of the earlier facilities may prevent certain ventilation practices from being incorporated into some of the facility designs. The authority having jurisdiction should prioritize projects based on the criteria above and complete those projects based on hazard concerns and financial ability. All correctional facilities in the State should be participating in the accreditation process through the American Correctional Association (ACA). This process involves evaluations for air circulation, illumination levels and noise levels.

(c) Child-frequented facilities. Greater diligence should be taken to ensure indoor air quality in facilities occupied by or frequented by children, such as schools and childcare facilities. Children are considered at higher risk for health problems from poor indoor air quality than are adults.

This 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 July 26, 2002.

TRD-200204667
Susan Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 458-7236

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PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 411. STATE AUTHORITY RESPONSIBILITIES
SUBCHAPTER B. INTERAGENCY AGREEMENTS

25 TAC §411.64

The Texas Department of Mental Health and Mental Retardation (department) proposes new §411.64, governing memorandum of understanding (MOU) on relocation pilot program.

The new section will adopt by reference a new rule of the Texas Department of Human Services (TDHS) at Texas Administrative Code, Title 40, §72.104, governing memorandum of understanding on relocation pilot program, that was published for public review and comment in the July 26, 2002, issue of the *Texas Register* (27 TexReg 6670).

The TDHS rule contains the text of a new memorandum of understanding (MOU) between the department, TDHS, and the Texas Department of Protective and Regulatory Services (TDPRS). The agencies are required by Texas Human Resources Code (THRC), §22.038, as added by Senate Bill 367 (SB 367) of the 77th Legislature, to develop and adopt the MOU by rule. The MOU will facilitate the coordination and implementation of a pilot program, subject to availability of funds, required by THRC, §22.037, also added by SB 367. The pilot program is intended to provide opportunities for persons with disabilities to move out of nursing facilities into community-based settings. The MOU defines the responsibilities of each agency for implementing the pilot program.

Cindy Brown, chief financial officer, has determined that for each year of the first five year period that the new section is in effect, enforcing or administering the new section does not have foreseeable implications relating to costs or revenues of state or local government. It is not anticipated that the proposed amendments will have an adverse economic effect on small businesses or micro-businesses. It is not anticipated that there will be any additional economic cost to persons required to comply with the amendments. It is not anticipated that the amendments will affect a local economy.

David Rollins, acting director, Long Term Services and Supports, has determined that for each year of the first five-year period the new section is in effect, the public benefit expected will be that the persons served by each of the agencies involved in the MOU will know which services of the pilot program will be provided by each agency. It is anticipated that the interagency cooperation will result in better services to these persons are served jointly by the three agencies.

Comments concerning the proposed new sections must be submitted in writing to Linda Logan, director, Policy Development, by mail to Texas Department of Mental Health and Mental Retardation, P.O. Box 12668, Austin, Texas 78711, by fax to (512) 206-4744, or by e-mail to policy.co@mhmr.state.tx.us within 30 days of publication of this notice.

The amendments are proposed under the Texas Health and Safety Code, §532.015, which provides the Texas Mental Health and Mental Retardation Board with broad rulemaking authority,

and under THRC, §22.038, which requires the department to adopt the MOU by rule.

The amendments will affect THRC, §§22.37 and 22.038.

§411.64. Memorandum of Understanding (MOU) on Relocation Pilot Program.

(a) Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts by reference a rule of the Texas Department of Human Services (TDHS) contained in 40 TAC §72.104 (relating to Memorandum of Understanding on Relocation Pilot Program).

(b) The TDHS rule contains the text of a memorandum of understanding (MOU) between:

(1) TDMHMR;

(2) TDHS; and

(3) Texas Department of Protective and Regulatory Services.

(c) The MOU is required by Texas Human Resources Code, §22.038. It requires the three agencies to coordinate and implement a pilot program, subject to availability of funds, to provide a system of services and supports that fosters independence and productivity and provides meaningful opportunities for persons with disabilities to live in the community. The terms of the MOU apply in those areas of the state in which community awareness and relocation pilot programs will be implemented.

(d) Copies of the MOU are filed in the Office of Policy Development, TDMHMR, 909 West 45th Street, Austin, Texas 78756, and may be reviewed during regular business hours.

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

Filed with the Office of the Secretary of State on July 29, 2002.

TRD-200204736
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 206-5232

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PART 8. INTERAGENCY COUNCIL ON EARLY CHILDHOOD INTERVENTION

CHAPTER 621. EARLY CHILDHOOD INTERVENTION

SUBCHAPTER B. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

25 TAC §§621.24 - 621.26, 621.28 - 621.31

The Interagency Council on Early Childhood Intervention (ECI) proposes amendments to current sections of 25 TAC §§621.24 - 621.26 and §§621.28 - 621.31 regarding service delivery requirements, data reporting, contract management, fiscal management, monitoring, "best value" criteria for selecting providers, due process procedures for providers, and related agency activities.

Mary Elder, Executive Director, Interagency Council on Early Childhood Intervention, has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the assurance that children with developmental disabilities and delays and their families receiving services from council providers are receiving appropriate services; that minimum standards of uniform practice and procedure for council providers exist; that federal, state, local, and private funds being used to pay for early intervention services supplement, and in no case supplant, state and federal funds appropriated to the agency for such services; that compliance with contract and program standards related to services and/or billing and reimbursement is increased; that corrective actions for failure to meet fiscal or programmatic standards are clarified; that accountability for the expenditure of funds by council providers is increased; and that council rules regarding provider appeals are consistent with minimum standards of due process.

Specifically, ECI proposes changes to:

25 TAC § 621.24 regarding data collection and reporting requirements for local ECI program providers;

Section 621.25 regarding local program requirements for maintenance of effort, program income, and allowable and unallowable costs;

Section 621.26 regarding financial management requirements for local program providers, including reports, data submission and audit requirements;

Section 621.28 regarding the council's process for awarding contracts;

Section 621.29 regarding requirements for the signing and processing of contracts between the council and local provider agencies and making amendments to substantive contract requirements;

Section 621.30 regarding actions the council can take relating to a contract between the council and a local provider agency; and

Section 621.31 regarding dispute resolution procedures for local provider agencies.

Mary Elder has determined that for the first five years the proposed sections will be in effect the fiscal implications for state or local government as a result of enforcing or administering the sections will be as follows:

Section 621.24 potential savings for state government due to identification, coordination, and collection of additional federal, state, local, and private funds and maximization of all other funding sources before expenditure of council funds;

Section 621.25 potential cost savings for state government due to maximization of all other funding sources before expenditure of council funds; improved enforcement of federal and state requirements that federal, state, local and private funds used to pay for early intervention services supplement, and in no case supplant, state and federal funds appropriated to the agency for such services; and improved enforcement of requirements regarding allowable and unallowable costs;

Section 621.26 potential cost savings for state government due to maximization of all other funding sources before expenditure of council funds; improved enforcement of local maintenance of effort requirements; improved enforcement of federal and state requirements that federal, state, local and private funds used to pay for early intervention services supplement, and in no case

supplant, state and federal funds appropriated to the agency for such services;

Section 621.28 no impact

Section 621.29 no impact

Section 621.30 no impact

Section 621.31 no impact

Mary Elder has determined that for the first five years the proposed sections will be in effect the economic cost to persons required to comply with the rules will be as follows:

Section 621.24 and §621.26 potential annual increased cost to local programs for data entry approximating a total of $206,310 statewide, based on FY2003 funding requests from providers

Section 621.25 no impact

Section 621.28 no impact

Section 621.29 no impact

Section 621.30 no impact

Section 621.31 no impact

There will be no impact on local employment because of the rules.

Public comment on the proposed rules may be submitted in writing, verbally, or via e-mail to: Denise Brady, General Counsel, Interagency Council on Early Childhood Intervention 4900 N. Lamar Blvd Austin, Texas 78751, phone (512) 424-6754, facsimile (512) 424-6749, electronic mail Denise.Brady@eci.state.tx.us.

Comments must be submitted within 30 days of publication in the *Texas Register*. For further information or questions concerning this proposal, please contact Cindy Martin at (512) 424-6752 or Cindy.Martin@eci.state.tx.us

A public hearing on the rules will be held August 20, 2002, at 3:00 p.m. in public hearing room 1410-1420 in the Brown-Heatly Building, 4900 North Lamar Blvd, Austin, Texas 78751.

The rule amendments to §§621.24 - 621.26 and §§621.28 - 621.31 are proposed under Texas Human Resources Code, §73.0051(b) which authorizes the council to adopt rules to provide for compliance with the terms and provisions of applicable federal and state laws in the administration of programs and the delivery of services to eligible children, to establish a program to monitor fiscal and program implementation, and to establish appropriate sanctions for providers who fail to comply with statutory and regulatory fiscal and program requirements. To facilitate the coordination of payment for early intervention from federal, state, local and private sources as required by federal law.

Sections 621.28 - 621.31 are also proposed under Texas Human Resources Code, §73.011 which requires the council to select early intervention service providers on a best value basis in a manner that maximizes federal, private, and local sources of funding, and which promotes competition when possible.

§621.24. Program Administration for Comprehensive Services.

(a) (No change.)

(b) Program requirements.

(1)-(14) (No change.)

(15) Data collection and reporting. The provider shall collect and report data as required by council rules, the contract, and applicable instruction manuals. Reports shall be submitted in the form, manner, and timeframe specified by the council. Required data may include, but is not limited to: client data, including personally identifiable information regarding children served or referred; services received by individual eligible children; family information, including family size and income; service provider information, including information about individual employees or subcontracted employees of the provider; agency and ECI program revenue and expenditure information; and any other information that might be necessary by the council to perform their legally authorized functions, including the documentation of services planned and provided, billing and reimbursement functions, and other purposes.

(16) The Texas Kids Intervention Data System (T-KIDS) and data standards, established by the council under Texas Human Resources Code §73.0051(k), shall be used by ECI providers to submit client and services information to the council. The data standards and reporting requirements, including reporting deadlines, will be established with local provider input and will be published annually and disseminated to providers. The council may approve changes to the data standards or requirements outside of this process when necessary for efficient implementation of data collection.

§621.25. Application and Program Requirements for Comprehensive Services.

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

(d) Program income.

(1) Program income is defined as all revenue directly generated by ECI contract-supported activities or earned as a result of the ECI contract. It includes, but is not limited to, Medicaid Targeted Case Management (TCM), Medicaid Texas Health Steps/Comprehensive Care Program (THSteps/CCP), Medicaid Administrative Claiming (MAC), Children's Health Insurance Program (CHIP), Children with Special Health Care Needs (CSHCN) funds, and private insurance.

(2) Program income also includes proceeds from the sale of equipment or income collected by a subcontractor on behalf of the provider from Medicaid, CHIP or private insurance and accepted as payment in full for ECI services.

(3) Program income excludes third party revenue generated from Developmental Rehabilitation Services (DRS).

(4) All program income collected by the ECI program must be reported and used for eligible ECI program expenditures.

(5) Program income claims, collections, uncollected amounts, and prior year collections must be reported cumulatively by source on quarterly and annual financial reports. The ECI provider is accountable for and must report total program income on an accrual basis by the date of service. Program income earned during the state fiscal year ending August 31 and collected no later than October 31 of the following fiscal year must be used for allowable program expenses in the fiscal year in which the service was provided and the revenue was earned.

(6) Interest earned on program income will be used to supplement the funds already committed to the program.

(7) Cumulative collections are total program income received from current fiscal year claims. Cumulative uncollected program income is income not received for the current fiscal year cumulative claims. Accrued revenues should be adjusted through periodic write-off of uncollectible amounts.

(e) Maintenance of Effort

(1) Maintenance of effort (MOE) represents the total funds and in-kind contributions available for support of the ECI program from sources other than the ECI contract. Reporting of MOE requires that all operating expenses, revenue sources, and in-kind contributions be reported to provide a clear and comprehensive valuation of the ECI program.

(2) The ECI provider's MOE may include, if applicable and allowable, the following:

(A) Federal, state, and local funds;

(B) Private contributions;

(C) In-kind contributions, if properly valued (see subsection (f) of this section, concerning "allowable costs," and subsection (g) of this section, concerning "unallowable costs"); and

(D) Program income and/or third party reimbursements.

(3) To be acceptable as MOE, funds must be:

(A) Identifiable, by the source of the funds, from the provider's accounting records and in-kind contribution records;

(B) Necessary and reasonable for proper and efficient accomplishment of ECI program objectives, and

(C) For costs or in-kind contributions that are allowable per Uniform Grant Management Standards (UGMS) and the approved ECI contract budget.

(4) Providers that have not previously contracted with the council will be expected to achieve the MOE level as designated in their contract.

(5) Each program that has previously contracted with the council is required to budget and expend at least the same amount of MOE, from each revenue source other than program income and in-kind and cash contributions, as was actually expended from that source in the preceding fiscal year, and as specified in their approved funding application and contract.

(A) To determine the amount of MOE which must be maintained, subtract the ECI contract funds, program income, and in-kind and unsolicited cash contributions from the total program costs used for the ECI program. The remaining funding, known as the "effective MOE," must meet or exceed the previous year's expenditure level by specific source of funds.

(B) Program income is excluded from the effective MOE calculation because increases in the funding sources that comprise program income cannot be used to supplant other funding sources. In-kind expenditures are excluded because they do not represent actual cash expenditures. Unsolicited cash contributions are excluded because they are variable by their nature.

(6) MOE will be reviewed by the council and the external auditor to ensure that the effective MOE is maintained at the appropriate level.

(A) ECI providers will report program revenue and expenditures by funding source on annual financial reports submitted to the council. The council will review MOE reporting throughout the year and as part of the final closeout process and follow up with providers to resolve any concerns about compliance with this policy. Settlement related to MOE shortages will be required prior to the closeout for each contract year.

(B) Verification of maintenance of effort information will be made as an integral part of monitoring activities. This will include a review of accounting records, annual audits, and other related information that provides evidence of revenue sources and expenditures in the ECI program.

(7) The council may make exceptions to the requirement that effective MOE must be maintained at a level equal to or above the level of that source in the previous year as a result of:

(A) Decreases in the number of children who are eligible to receive early childhood intervention services;

(B) Funds expended for long-term purposes such as the acquisition of equipment or the construction of facilities;

(C) One time only expenditures to alleviate funding deficits; or

(D) Documented losses of a specific funding source beyond the control of the provider.

(8) Increases in program income revenues from one fiscal year to the next cannot be used to supplant other MOE funding sources. Supplanting is defined as the withdrawal of local, private, or other public funds for services that were available during the previous year of funding. All program income collected by the ECI program must be reported and used for eligible ECI program expenditures. Increases in one revenue source used as MOE cannot be used to replace, supplant or reduce the revenue obligation of another MOE source.

(9) Voluntary displacement of MOE funds is not allowed. Redistribution, reallocation or removal of a specific revenue source is prohibited unless the revenue source is discontinued, decreased, or no longer available to the provider.

~~[(d) Applicant share or maintenance of effort (MOE).]~~

~~[(1) The maximum reimbursement through Early Childhood Intervention (ECI) for continuation programs is contingent on program expenditure levels maintained in the previous year in which ECI funds were requested. All ECI providers are required to maintain the level of other (non-ECI) funding which was expended for ECI program operations in the previous year.]~~

~~[(2) New providers may follow a phase-in period for developing their MOE. The following schedule illustrates the maximum reimbursement percentages for new programs in their first three years.]~~ ~~[Figure: 25 TAC §621.25 (d)(2)]~~

~~[(3) All funds used to support allowable ECI program costs, other than ECI contract funds, must be reported as applicant share. The applicant share or MOE may include the following:]~~

~~[(A) federal, state, and local funds if allowable as match by source of funds;]~~

~~[(B) private contributions;]~~

~~[(C) third party reimbursements; and]~~

~~[(D) in-kind contributions if properly valued (see subsection (e) of this section, concerning "allowable costs," and subsection (f) of this section, concerning "unallowable costs").]~~

~~[(4) Contributions will be accepted as applicant share when such contributions are:]~~

~~[(A) identifiable from the provider's records;]~~

~~[(B) necessary and reasonable for proper and efficient accomplishment of provider's objectives; and]~~

[(C) types of costs which are allowable (e.g., new services or the expansion of existing services).]

[(5) If the applicant share is contributed in whole or in part by another agency, there shall be an attachment to the application which details the source and amount of such contribution and which acknowledges that such contributor agrees to be bound by all contract assurances.]

[(6) All program income earned by the local ECI program must be reported and either used to increase the funding level of the ECI program or deducted from the total program cost. Program income must be reported and expended when it becomes both measurable and available within the fiscal year in which it is earned or no later than 90 days after the fiscal year end. Program income may only be carried forward if it exceeds the projected amounts and with prior written approval from the council staff.]

(f) [(e)] Allowable costs.

(1) The following is intended to be a summary of the most frequently requested allowable costs, and should not be construed to be complete. Exclusion of a particular item from the allowable list does not necessarily mean it is unallowable. All costs to be reimbursed by ECI or applicant share must go exclusively for conducting the program. A complete list of expenditures is listed in the Uniform Grant Management Standards (UGMS):

(A) personnel--salaries and wages and fringe benefits;

(B) consultants--only for essential services which cannot be met by applicant personnel;

(C) travel and/or transportation--staff travel necessary for the conduct of the program. Children's transportation on public or private systems when such transportation is ECI - related;

(D) consumable supplies--allowable when necessary for program operations; and

(E) equipment--tangible nonexpendable personal property with an acquisition cost of [over] $1,000 or greater per unit and a useful life of more than one year, with the following exceptions: facsimile machines, stereo systems, still and video cameras, VCRs and VCR/TV combinations, [cellular and portable telephones,] microcomputers, [and] printers, and digital cameras. These items will be considered equipment if their unit cost is [over]$500 or greater.

(F) [(2) The following expenses are the most common types of "other"]"Other expenses," such as:

(i) [(A)] communications such as telephone charges;

(ii) [(B)] depreciation--allowable whenever real or personal property are used for the benefit of the program with council staff approval;

(iii) [(C)] insurance;

(iv) [(D)] rental of space;

(v) [(E)] maintenance and operation including utilities--prorated to the actual amount of space used by the program;

(vi) [(F)] taxes--allowable only for those taxes which the provider is required to pay for employment services, travel, renting, or purchasing for the program;

(vii) [(G)] printing and reproduction of program materials;

(viii) [(H)] postage and shipping;

(ix) [(I)] advertising for public awareness and recruitment of staff;

(x) [(J)] registration fees for staff development;

(xi) [(K)] agency vehicle operating costs; and

(xii) [(L)] indirect costs.

(g) [(f)] Unallowable costs.

(1) The following is intended to be a summary of the most frequently requested unallowable costs, and should not be construed to be complete. Exclusion of a particular item from the unallowable list does not necessarily mean it is allowable.[The following are the most common types of costs which are requested but unallowable:]

(A) construction or renovation of buildings; [and]

(B) purchase of land or buildings;[.]

(C) bad debts;

(D) contingency funds;

(E) entertainment expenses;

(F) Fines and penalties;

(G) Interest and other financing costs;

(H) Legislative expense;

(I) Under recovery of costs under grant agreements;

(J) Fund-raising expenses and investment management costs;

(K) purchase of vehicles;

(L) lobbying; and

(M) Other costs not included in the approved ECI budget.

(2) Items excluded from paragraph (1) of this subsection are not necessarily allowable.

§621.26. Financial Management and Recordkeeping Requirements.

(a) General. The provider shall comply with the requirements of the contract and the provisions of subsections (b)-(d) of this section.

(b) Financial management system.

(1) The provider will be expected to implement a financial management system which will comply with the Uniform Grant Management Standards (UGMS) and also provide for the following:

(A) accurate, current, and complete disclosure of the financial status of the provider's Early Childhood Intervention (ECI) program;

(B) records which identify the source and application of funds, including funds reported as MOE, for provider supported activity;

(C) effective control over and accountability of all funds, property, and other assets. Providers shall adequately safeguard all such assets and shall assure that they are used solely for authorized purposes;

(D) comparisons of actual amounts expended with budgeted amounts for each program.

(2) Accounting for applicant funds, including funds reported as MOE, should be in accordance with the provisions in the UGMS. All documents supporting program income and expenditures shall be reported [recorded] in sufficient detail to show the exact

source [nature and cost of the expenditures] for each account. Records must be maintained in such a manner to permit preparation of required financial reports and to indicate that funds are used for the purpose and benefit of the ECI Program. Any funds not expended in accordance with the approved application and the contract entered into between the provider and the council must[Interagency Council on Early Childhood Intervention Services should] be returned to the council.

(3) All records pertaining to the financial management of the program shall be maintained for a period of five years (or until all audit questions are resolved) from the date of submission of the annual or final report.

(c) Reports and data submission.

(1) All providers will be expected to submit enrollment and service delivery information on a monthly basis, quarterly and final financial and program performance reports by the specified date and in the specified format, and must participate in the Texas Kids Intervention Data System as specified in §621.23 (15) of this title (relating to Service Delivery Requirements for Comprehensive Services).

(2) The council will establish monthly, quarterly and final report deadlines at the beginning of each fiscal year and will notify providers in their contract.

(3) The council is authorized to withhold payment and return vouchers to any provider whose reports are delinquent.

(d) Reviews[On-site reviews].

(1) Program review.

(A) The council staff will conduct reviews [on-site visits] of providers to determine compliance with the contract and evaluate the work performed by the ECI program. These include desk reviews and on-site reviews.

(B) Program review will include a review of policies and procedures, individual records of services provided to children and families, documentation of data submitted to the council, contact with parents, staff, community members, fiscal records, and documentation of other requirements of the ECI contract, rules, and policies.

(2) Financial review. The council staff will conduct a financial review to ascertain that program costs are:

(A) allowable as budgeted;

(B) properly documented;

(C) necessary and reasonable; and

(D) in compliance with all contract requirements.

(3) Record availability. All records shall be made available to the council's monitoring teams.

(e) Audit requirements. Providers shall have a financial audit of the ECIprogram [Program] performed by an independent certified public accountant (CPA) or other independent public accountant licensed by the Texas State Board of Public Accountancy for those fiscal years that include any portion of an ECI contract period. A copy of this audit must be sent to the council within the earlier of 30 days after [of] receipt from the independent CPA, or nine months after the end of the audit period, unless a longer period is agreed to in advance by the council or a different period is specified in a program-specific audit guide.

§621.28. Contract [Annual] Award

(a) Following the review process, the board will meet to approve funding recommendations. Each applicant will be notified in writing of the board's decision. The reason for a denial will be communicated in writing to the applicant.

(b) Decisions for award of subsequent contracts will follow the procedures used for awarding initial contracts.

[(b) If the application is for the continuation of an existing program and the board proposes to deny funding, the notification to the applicant of the proposed denial shall advise the applicant that it has the right to a hearing on the proposed denial in accordance with the hearing procedures in §621.31 of this title (relating to Formal Hearing Procedures), except when the proposed denial is based on the unavailability of funds or a change in program direction. If the applicant does not request a hearing within 10 days after receipt of the notification of proposed denial, the applicant is deemed to have waived the hearing and the denial becomes effective.]

§621.29. Contract.

(a) An approved provider will enter into a contract with the Interagency Council on Early Childhood Intervention (council) prior to being allocated funds. A contract is not fully executed until it has been signed by the council and the provider.

(1) The council shall send the provider two original contracts signed by the council. Both copies of the contract must be signed by an official authorized to enter into such agreements on behalf of the governing body. One copy shall be submitted to the council before the start of the contract period and the other shall be maintained by the organization.

(2) The original contract cannot be altered by the ECI provider without council consent. This consent can only be evidenced by authorized officials of both parties initialing and dating the change.

(3) No payment or advance of funds will be made until the contract is fully executed.

(4) By signing the contract the provider agrees to all terms included therein and to adherence with all statutes, rules, policies and procedures of the council, including subsequent amendments.

(b) The contract shall:

(1) contain provisions requiring the provider to comply with the requirements in these sections, including statutes, rules, policies and procedures of the council, including subsequent amendments [the program requirements as stated under the Human Resources Code, §73.0051, policies and guidelines, program monitoring requirements], and the fiscal requirements on the administering, accounting, auditing, and recovering of funds as authorized by the Uniform Grant Management Standards (UGMS);

(2) state the contract number of children; this is the total number of eligible developmentally delayed children that the provider [provider's ECI program] has the capacity to serve at any one time;

(3) authorize the council to impose sanctions for noncompliance with contract terms and conditions, statutes, rules, and council policies and procedures in accordance with the provisions of the Human Resources Code, §73.0051;

(4) incorporate the provider's application as part of the contract;

(5) [(4)] include clearly defined goals, outputs, and measurable outcomes which directly relate to program objectives; and

[(5) contain provisions that the council may reduce a contract when the provider fails to serve the number of children on which the budget was based.]

(6) authorize the council to adjust the contract amount without board approval when the number of enrolled children on which the budget was based increases or decreases by a specified percentage or number of children, and

(7) require the provider to notify the council by January 31st of its intent to withdraw as a provider in the next fiscal year.

(c) Changes in state or federal laws and regulations or judicial interpretation of laws and regulations that occur during the contract period may affect contract provisions. Any modifications resulting from such changes are automatically made part of the contract and go into effect on the effective date of the law, regulation, or court decision.

(d) [~~(c)~~] The contract shall be concurrent with the current fiscal year, unless the board approves [~~approved~~] partial year funding due to extenuating circumstances.

(e) [~~(d)~~] Program and fiscal findings documented in council monitoring or other reports must be cleared in accordance with the council policies, provisions in the UGMS and within the time frame specified in the monitoring or other report.

(f) [~~(e)~~] The contract shall identify the county(ies) in which the provider is authorized to perform ECI services and reference the service area approved by the council staff within the county(ies).

(1) All requests to change the approved service area must be reviewed and approved by the council staff.

(2) The council will not incur additional expenses for the provision of the same level of services for the same number of children as a result of a request to change a service area.

(3) A request to change the designated service area must be either made during the annual award process or at a regularly scheduled board meeting.

§621.30. Contract Actions [~~Cancellation of Contract with Provider~~].

The Interagency Council on Early Childhood Intervention (council) may take the following actions with respect to a contract with a provider [~~may cancel the contract under the following conditions~~]:

(1) Suspend all or part of the contract. Suspension is the temporary withdrawal of the provider's authority to obligate funds pending corrective action by the provider or its subcontractors or pending a decision to terminate or amend the contract. Provider costs resulting from obligations incurred by the provider during a suspension are not allowable unless expressly authorized by the notice of suspension.

[~~(1) The council may propose to cancel the contract in whole or in part prior to the date of completion. The council may propose this action whenever it is determined that the provider has not been or is not in substantial compliance with the contract provisions, applicable federal or state law or regulations, Early Childhood Intervention Program (ECI) policies, or the Uniform Grant Management Standards (UGMS). If the council discovers gross mismanagement of a program's finances or contract, the council may propose cancellation of the contract.~~]

(2) Withhold or reduce payments. The council may withhold or reduce payments to offset any reimbursement made to the provider for any ineligible expenditures not refunded to the council by the provider, or for services that are covered by Medicaid. The council may withhold or reduce payments for noncompliance issues including, but not limited to, the following: failure to submit required program and financial reports, including failure to submit T-KIDS data, by specified timelines; failure to respond to required corrective actions resulting from monitoring activities; failure to submit independent audit reports as required by applicable OMB Circulars; and failure to meet program requirements as specified in the contract, regulations or policies.

(3) Revise contract terms and provisions. The council may revise contract terms and provisions to accomplish objectives including, but not limited to, the following: establishing additional prior approvals for expenditure of funds by the provider; reducing the contract amount for failure to achieve or maintain the proposed level of service; expending funds appropriately; or providing services as set out in the contract.

(4) Non-renewal of contract after contract term. The council may choose not to issue another contract with a provider after the contract term expires.

(5) Terminate all or part of the contract

(A) If the council determines that the provider is not, or has not been, in substantial compliance with the contract provisions, applicable federal or state law or regulations, ECI Policies and Procedures, Uniform Grant Management Standards (UGMS) or applicable OMB circulars, the council may propose to terminate part or all of the contract before the term of the contract expires.

(B) [~~(2)~~] If the council proposes to terminate [~~cancel~~] the contract, the council shall notify the provider in writing of the reasons for the proposed termination [~~cancellation,~~] and give the provider an opportunity to contest the proposed action through a formal hearing. The hearing shall be in accordance with the hearing procedures in §621.31 of this title (relating to Formal Hearing Procedures). The provider may request a hearing by giving written notification to the Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399. Any questions which the provider might have concerning the proposed action shall be addressed to the council's executive director.

(C) [~~(3)~~] The provider has 10 days to request a hearing on a proposed cancellation under paragraphs (1) and (2) of this section. If the provider does not request a hearing in writing within the 10-day period, the provider shall be deemed to have waived the hearing and the council will proceed to cancel the contract.

[~~(4) If the council proceeds to cancel the contract because either the provider has waived the hearing or the hearing decision upholds the proposed cancellation, the council shall give the provider 30 days written notice prior to termination. During this time period, the provider shall assist the council in providing for alternative services for children served under the contract.~~]

[~~(5) Any proposed cancellation of a provider contract may be in addition to or in conjunction with a decision to withhold funds from the provider.~~]

(D) [~~(6)~~] Between the time a provider files a request for a hearing and the final decision of the board, any funds eligible for distribution may be retained at the sole discretion of the board. In the event the board's final decision is favorable to the provider, the eligible funds shall be promptly distributed to the provider. In the event the board's final decision is adverse to the provider, the funds may [~~shall~~] be withheld.

(E) [~~(7)~~] No contract will be terminated [~~canceled~~] prior to the final decision of the board following a hearing provided under these sections if such a hearing is requested.

(6) Any proposed termination of a provider contract may be in addition to or in conjunction with a decision to withhold funds from the provider.

§621.31. Dispute Resolution and Formal Hearing Procedures.

(a) Purpose. This section covers the formal hearing procedures and practices that will be available to persons or parties who request formal hearings before the Interagency Council on Early Childhood Intervention (council). The intended effect of these procedures is to implement the contested case provisions of the Administrative Procedure Act (APA), Title 10 of the Texas Government Code, §2001.051, et seq. These hearing procedures will be used for all providers funded by the council, except instances when the rules provide that another fair hearing procedure will be used or when the council elects not to renew a contract with a previous provider(s) [~~undertake a new or different program direction~~]. Hearings will be conducted in accordance with the APA, rules of the State Office of Administrative Hearings (SOAH), and the rules of the council. State Office of Administrative Hearing rules may be obtained from that office. If there is a conflict between the SOAH rules and the rules of the council in regards to the proceeding, the rules of the council will control.

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

(1)-(5) (No change.)

(c) Applicability and scope of rules.

(1) The provisions of this section shall apply in all cases when the council proposes to terminate [~~cancel~~] a contract with a provider or, withhold funds from a provider [~~, or deny continuation funding to a provider~~].

(2) All matters not specifically included in the procedural rules adopted by the council shall be governed by [~~the Act and~~] the State Office of Administrative Hearings Rules of Procedure.

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

(f) Notice and service in proceedings.

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

(4) The council staff shall mail the notice of the proposed contract termination or [~~cancellation,~~] withholding of funds,[~~or denial of continuation funding~~] by certified or registered mail to the last known place of address of the person entitled to receive such notice.

(5)-(6) (No change.)

(g) Request for hearing. Any person who receives a written notice to propose to terminate [~~cancel~~] the contract or, withhold funding [~~,or deny continuation funding~~] must file a request for hearing with the council's executive director, 4900 North Lamar Boulevard, Austin, Texas 78751-2399 within ten days of receipt of the notice. The request for hearing shall be deemed filed only when actually received by such office. Failure to file a request for hearing shall be considered a waiver by the person of his right to a fair hearing after the action is taken to terminate [~~cancel~~] the contract or, withhold funding [~~,or deny continuation funding~~], and the council shall proceed to finalize its earlier decision. The request for hearing shall include:

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

(h)-(o) (No change.)

~~[(p) Hearing procedure for denial of the continuation of funding to a provider. The hearing procedure described in subsections (a)-(o) of this section shall govern all such proceedings except that the party who has been denied the continuation of funding and is requesting that the decision of the board to deny funding be reversed has the burden of proving that such an action is justified.]~~

This 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 July 29, 2002.

TRD-200204728
Mary Elder
Executive Director
Interagency Council on Early Childhood Intervention
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 424-6750

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

The Texas Department of Insurance proposes amendments to §5.4001, the plan of operation of the Texas Windstorm Insurance Association (Association or TWIA), and §5.4501 concerning the adoption by reference of the rule manual governing the writing of windstorm and hail insurance coverage by the Association. The purpose of the Association is to provide windstorm and hail insurance coverage to coastal residents who are unable to obtain such coverage in the voluntary market.

Subsection (d)(1)(E)(ii) of §5.4001 (the TWIA Plan of Operation) outlines the procedures regarding the binding of new or increased coverage including an exception when a hurricane is in the Gulf of Mexico or within the boundaries of 80 degrees west longitude and 20 degrees north latitude (80/20 zone). The language in subsection (d)(1)(E)(ii) specifies that, if a hurricane is not imminent, the date an application for new or increased coverage will be accepted by TWIA includes both the date the application is received by the Association and the date that the application is mailed if sent by registered, certified, or United States Postal Service Express Mail, or if sent by regular mail that is hand canceled by the United States Postal Service. However, in this subsection there is an exception to this general rule, regarding the binding of new or increased coverage when a hurricane is imminent.

At its September 2001 meeting, the TWIA Board of Directors met and requested that its Underwriting Committee review and recommend changes to the existing exception, which was not date or time specific regarding when TWIA would no longer accept applications for new or increased coverage when a hurricane is imminent. At the December 2001 TWIA Board meeting, the Underwriting Committee presented its recommendations to the Board, which voted to petition the Department to amend the exception to more clearly define when new or increased coverage will no longer be accepted due to an imminent storm.

To remedy the lack of date and time specificity of the existing exception, TWIA's petition proposes new language which specifies that no new or increased coverage applications shall be accepted by TWIA on the day (beginning at 12:01 a.m.) when a

hurricane designated by the United States Weather Bureau is in the Gulf of Mexico or within the boundaries of 80 degrees west longitude and 20 degrees north latitude, until the General Manager of TWIA determines that the storm no longer threatens property in the designated catastrophe area. The proposed exception does not apply to an application delivered in person to the TWIA's Austin office during its normal business hours prior to a hurricane being in the Gulf of Mexico or within the boundaries of 80 degrees west longitude and 20 degrees north latitude or to an application that is mailed by registered mail, certified mail, United States Postal Service Express Mail, or regular mail that has been hand cancelled by the United States Postal Service prior to the first day when a windstorm that has been designated a hurricane by the United States Weather Bureau is in the Gulf of Mexico or the 80/20 zone. Such hand delivered or mailed applications become effective on the date they are delivered in person or the date they are mailed or a later date if stipulated on the application.

The amendment to §5.4501 proposes to adopt by reference a rule revision to the manual that is necessary to conform General Rule I, (New or Increased Coverage and Renewal Applications) to the proposed changes to the plan of operation. General Rule I contains the same language as the plan of operation concerning the exception to binding new or increased coverage when a storm is imminent. Any changes to the language in the plan of operation regarding the exception to binding coverage when a storm is imminent will also be required to be reflected in General Rule I.

A copy of the petition along with the proposed amendment to the manual rule is available for review in the Office of the Chief Clerk, Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas, 78714-9104. To request a copy of the petition with the attachments, please contact Angela Arizipe at 512/322-4147. The department will consider the adoption of amendments to §5.4001 and §5.4501 in a public hearing under Docket Number 2526, scheduled for 9:30 a.m. on September 17, 2002, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas.

Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, has determined that for each year of the first five years the proposed amendments are in effect, there will be no fiscal implications for state government or local government as a result of enforcing or administering the proposed amendments. Ms. Hamilton has also determined that for each year of the first five years the proposed amendments will be in effect, there will be no adverse effect on local employment or the local economy.

Ms. Hamilton has further determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the sections will be to remove any ambiguity that may exist with the current language and to more clearly define the time and date when the acceptance of new or increased coverage will be cut off due to an imminent storm. The proposed amendments clarify the current procedures TWIA follows regarding acceptance of new or increased coverage when a storm is imminent, and will provide clearer notice to policyholders and new applicants of these procedures and requirements for obtaining new or increased coverage when a storm is imminent. There is no anticipated adverse economic effect on large, small, or micro-businesses that are required to comply with the proposed amendments because the amendments do not add any new requirements to the plan of operation.

To be considered, written comments on the proposed amendments must be submitted no later than 5:00 p.m. on September 9, 2002 to Lynda H. Nesenholtz, General Counsel and Chief Clerk, MC 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comment should be simultaneously submitted to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, MC 104-PC, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104.

DIVISION 1. PLAN OF OPERATION

28 TAC §5.4001

The amendments are proposed pursuant to the Insurance Code Article 21.49 and §36.001. Article 21.49 §5(c) of the Insurance Code provides that the Commissioner of Insurance by rule shall adopt the TWIA plan of operation with the advice of the TWIA board of directors. Section 5(f) of Article 21.49 provides that any interested person may petition the Commissioner to modify the plan of operation in accordance with the Administrative Procedure Act. Article 21.49 §8 authorizes the Commissioner of Insurance to approve, modify, or disapprove every manual of classification, rules, rates, rating plans, and every modification of any of the foregoing used by the Association. Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt rules which must be for general and uniform application, for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by statute.

The following statute is affected by this proposal: Insurance Code Article 21.49

§5.4001. Plan of Operation.

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

(d) Catastrophe Insurance.

(1) (No change.)

(2) Applicant, acceptance, and rejection.

(A)-(D) (No change.)

(E) Receipt of the application.

(i) (No change.)

(ii) New or increased coverage will be effective on the date received by the association or effective on the date the application is mailed if sent by registered or certified mail, or by United States Postal Service Express Mail, or if sent by regular mail that is hand cancelled by the United States Postal Service, or if sent by such other similar mailing procedure as approved by the board of directors, prior to the time specified in this clause as an exception, unless the application for new or increased coverage stipulates a later date. Renewal policies will be effective to provide continuous coverage if the request for a renewal is received on or before the expiration of the existing policy. Exception: no new or increased coverage applications will [~~shall~~] be accepted on the day (beginning at 12:01 A.M.) or after [~~when~~] a windstorm designated as a hurricane by the United States Weather Bureau is in the Gulf of Mexico or within the boundaries of 80 degrees west longitude and 20 degrees north latitude, until the General Manager determines that the storm no longer threatens property within the designated catastrophe area of the Texas Windstorm Insurance Association. This exception does not apply to any new or increased coverage application that meets underwriting criteria that is submitted as follows: delivered in person to the Texas Windstorm Insurance Association's Austin office during its normal business hours prior to a windstorm designated as a hurricane by the United States Weather Bureau being in the Gulf of Mexico

or within the boundaries of 80 degrees west longitude and 20 degrees north latitude; or mailed prior to the first day that a windstorm designated as a hurricane by the United States Weather Bureau is in the Gulf of Mexico or within the boundaries of 80 degrees west longitude and 20 degrees north latitude by registered or certified mail or United States Postal Service Express Mail or regular mail that is hand-canceled by the United States Postal Service or such other mailing procedure as approved by the Board of Directors. Such applications will be accepted and become effective on the date delivered in person or mailed or a later date if stipulated on the applications. This exception also does not apply to any renewal policy affording windstorm coverage if the expiring policy was written by the Texas Windstorm [~~Catastrophe Property~~] Insurance Association and if the application for renewal was received by the Texas Windstorm [~~Catastrophe Property~~] Insurance Association on or before the expiration of the existing Texas Windstorm [~~Catastrophe Property~~] Insurance Association policy or if mailed by registered or certified mail or United States Postal Service Express Mail or by regular mail that is hand-cancelled by the United States Postal Service, or if sent by such other similar mailing procedure as approved by the board of directors, prior to the expiration of the existing Texas Windstorm [~~Catastrophe Property~~] Insurance Association policy.

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

(e) (No change.)

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

Filed with the Office of the Secretary of State on July 29, 2002.

TRD-200204729
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-6327

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DIVISION 6. MANUAL

28 TAC §5.4501

The amendments are proposed pursuant to the Insurance Code Article 21.49 and §36.001. Article 21.49 §5(c) of the Insurance Code provides that the Commissioner of Insurance by rule shall adopt the TWIA plan of operation with the advice of the TWIA board of directors. Section 5(f) of Article 21.49 provides that any interested person may petition the Commissioner to modify the plan of operation in accordance with the Administrative Procedure Act. Article 21.49 §8 authorizes the Commissioner of Insurance to approve, modify, or disapprove every manual of classification, rules, rates, rating plans, and every modification of any of the foregoing used by the Association. Insurance Code §36.001 authorizes the Commissioner of Insurance to adopt rules which must be for general and uniform application, for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by statute.

The following statute is affected by this proposal: Insurance Code Article 21.49

§5.4501. Rules for the Texas Windstorm Insurance Association.

The Texas Department of Insurance adopts by reference a rules manual for the Texas Windstorm Insurance Association as amended effective, June 15, 1999. The Texas Department of Insurance adopts by reference amendments effective May 1, 2001, and October 1, 2002, to the rules manual. Copies of the rules manual may be obtained by contacting the Automobile and Homeowners Division, Mail Code 104-5A, Texas Department of Insurance, 333 Guadalupe Street, P.O. Box 149104, Austin, Texas 78714-9104.

This 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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Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 109. WORKERS' COMPENSATION COVERAGE FOR STATE EMPLOYEES

28 TAC §109.1

The Texas Workers' Compensation Commission (the commission) proposes an amendment to rule §109.1, concerning State Agencies: General Provisions. The amendment is proposed to reflect statutory changes in the state agency that is responsible for the administration of the government employees workers' compensation insurance and the state risk management programs. Texas Labor Code §412.001 established the State Office of Risk Management (SORM) to administer these programs while concurrently removing them from the Attorney General's Office and the commission, respectively.

The commission proposes the following changes to §109.1(b) and (c). Proposed amendments to subsection (b) would replace reference to "the Workers' Compensation Division of the Attorney General's Office" with "the State Office of Risk Management." Subsection (c) would be deleted and replaced with language requiring each state agency to provide to the commission a single administrative address for the purpose of administering workers' compensation claims, in the form and manner prescribed by the commission.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Hope Teneyuque, Manager, Support Services division, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule, as the rule merely reflects statutory changes that consolidated these programs in the State Office of Risk Management.

Ms. Teneyuque has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be that the rule will reflect legislative revisions that consolidated these programs in the State Office of Risk Management.

For the same reason (the rule merely reflects statutory changes), there will be no anticipated economic costs to persons who are required to comply with the rule as proposed, no costs of compliance for small businesses, and no adverse economic impact on small businesses or micro-businesses. There is no difference in the cost of compliance for small businesses as compared to large businesses.

Comments on the proposal must be received by 5:00 p.m., September 9, 2002. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us*or by mailing or delivering your comments to Nell Cheslock, Legal Services, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held on September 5, 2002, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us.*

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.006, which requires the filing of coverage and claim administration contact information with the commission; the Texas Labor Code §406.009, which requires the commission to collect and maintain coverage information and claim administration contact information; the Texas Labor Code, §412.011, which establishes the Office of Risk Management as the administrator of insurance services obtained by state agencies, including the government employees workers' compensation insurance program and the state risk management programs; the Texas Labor Code, '501.001, which contains definitions of terms used in Chapter 501; the Texas Labor Code §501.002, which lists the chapters and sections of the Texas Labor Code which are applicable to state agencies and establishes each individual state agency as the employer for workers' compensation purposes; the Texas Labor Code, §501.021, which established workers' compensation coverage for state employees; the Texas Labor Code, §501.023, which establishes the state as a self-insuring entity for compensable injuries that occurred prior to September 1, 1997; and the Texas Labor Code, §501.024, which sets out the exclusions from coverage.

The amendment is proposed under: the Texas Labor Code §402.061,§ 406.006, §406.009, §412.011, §501.001, §501.002, §501.021, §501.023, §501.024.

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

§109.1. State Agencies: General Provisions.

(a) In administering and enforcing the applicable provisions of the Texas Labor Code as set out in §501.002, a state agency shall act in the capacity of employer.

(b) In administering and enforcing the applicable provisions of the Texas Labor Code as set out in §501.002, the [~~workers' compensation division of the attorney general's office~~] State Office of Risk Management shall act in the capacity of insurance carrier.

(c) As an employer, each state agency shall file, in the form and manner prescribed by the Texas Workers' Compensation Commission (commission), a single administrative address with the commission for the purpose of administering workers' compensation claims. All workers' compensation claim notices or written communications to the agency as an employer will be sent to the agency's single administrative address, unless otherwise specified by rule. When the state agency's single administrative address changes, the state agency shall submit the new address at least 30 days prior to the change, in the form and manner prescribed by the commission. [~~Each state agency shall establish within its headquarters central office a single administrative address, for the purpose of administering workers' compensation claims as employer and shall provide that address in writing to the records division of the Texas Workers' Compensation Commission (Commission) by March 1, 1996. Other than communications and notices from Risk Management Division of the commission, all notices and written communications to state agencies as employers will be sent to the address provided by the state agency pursuant to this section, unless otherwise specified by rule. If the single administrative address changes, the state agency shall provide the new address to the records division of the commission at least 30 days in advance of the change.~~]

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204617
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 804-4287

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CHAPTER 134. BENEFITS--GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER F. PHARMACEUTICAL BENEFITS

28 TAC §134.501

The Texas Workers' Compensation Commission (the commission) proposes new §134.501, Initial Pharmaceutical Coverage.

This new rule is proposed to comply with statutory provisions of the Texas Labor Code (the Act). Prior to the 77th Texas Legislative Session, 2001, §408.028 required a health care practitioner providing care to an injured employee to prescribe any necessary prescription drugs in accordance with applicable state law. It also stated that an insurance carrier (carrier) could not require an employee to use pharmaceutical services designated by the carrier. House Bill 2600 (HB-2600), adopted during the 2001 Texas Legislative Session, amended §408.028, and added §413.0141, Initial Pharmaceutical Coverage. This new section of the Act allows the commission to adopt rules that will provide for payment of specified pharmaceutical services sufficient for the first seven days following the date of injury if the health care provider verifies insurance coverage and receives a verbal confirmation of an injury from the employer or from the insurance carrier. In addition, if the injury is determined to be non-compensable, the carrier is eligible for reimbursement from the subsequent injury fund (SIF) for such pharmaceutical services.

Proposed new §134.501 meets the statutory intent of §413.0141 by providing the requirements the health care provider must follow to ensure payment under this statute for prescription medication for the first seven days following the date of injury. The rule also provides the requirements the carrier must follow to obtain reimbursement from the subsequent injury fund if the injury is determined to be non-compensable. The Medical Advisory Committee (MAC) reviewed a draft of proposed §134.501 and provided advice and input for proposed §134.501. In addition, the House Bill 2600 legislative stakeholders group reviewed a draft of proposed §134.501 and provided comments. The commission's Medical Advisor also provided consultation and recommendations for this rule

Proposed new §134.501 establishes the process and requirements for reimbursement for prescription medication sufficient for the first seven days following the date of injury. If the health care provider documents verification of workers' compensation insurance coverage and receipt of a verbal confirmation that an injury has been reported to the employer or the carrier, the insurance carrier shall provide payment for pharmaceutical services sufficient for the first 7 days following the date of injury. If the injury is determined to be noncompensable, the carrier is eligible for reimbursement from the SIF pursuant to commission rules 116.11 and 116.12. HB-2600 gives the commission the authority to establish this process by adopting rules on or after September 1, 2002.

Subsection (a) of proposed new §134.501 defines the methodology for calculating the seven-day period following the date of injury and how reimbursement for the pharmaceutical services will be determined.

Subsection (b) of the proposed new §134.501 provides that the carrier may be eligible for reimbursement for payments made under subsection (a) from the subsequent injury fund (SIF) as provided in Chapter 116 of the commission rules.

Subsection (c) of the proposed new §134.501 states that the healthcare provider can verify insurance coverage and confirm a report of an on-the-job injury has occurred by calling the employer or the carrier. This section also establishes a requirement for the employer and/or the carrier, upon request, to verify insurance coverage and to confirm any report of an injury has been reported. Insurance coverage can also be confirmed by using the commission's Internet-based coverage verification system. When the health care provider has verified insurance coverage and has confirmed an injury has been reported, the health care provider is required to document how and from whom the verification and confirmation was received. When billing for the pharmaceutical services that were provided for the first seven days following the date of injury, the health care provider shall affirm on the bill for pharmaceutical services that the health care provider completed the required verification and confirmation.

Subsection (d) of proposed new §134.501 states that the health care provider may dispense the amount of medication ordered by the prescribing doctor in accordance with applicable laws. This will allow the dispensing health care provider to make the decision whether to dispense greater than the amount of pharmaceutical services sufficient for the first 7 days following the injury when the prescription is for a greater amount.

Subsection (e) of proposed new §134.501 allows voluntary certification of pharmaceutical services in accordance with Texas Labor Code §413.014(e) and §134.600 of this subtitle.

Subsection (f) describes the importance of communication in the prompt delivery of pharmaceutical services and encourages employees to promptly report injuries to their employer. This subsection encourages employers to provide the employee with a written statement that confirms that an injury has been reported, that identifies the date of injury and the name of the carrier. This subsection states that providing the information that verifies coverage and confirms that an injury was reported does not waive the employer's right to contest the compensability of the claim should the carrier accept liability for the claim. It also does not waive the insurance carrier's right to further review the claim under the Act and commission rules.

Judy Bruce, Director of Medical Review, has determined that for the first five-year period the proposed rule is in effect the fiscal implications for state or local governments as a result of enforcing or administering the rule are an increase in administrative costs to the commission resulting from the requests for reimbursement from the SIF. When the requests for reimbursement for initial pharmaceutical services are added to the other requests for reimbursement from the SIF, additional staff may be required to process all the requests for reimbursement from the SIF. There will be no impact on state revenue.

Reimbursing the carrier from the SIF for claims in which the injury is finally adjudicated to be not compensable will reduce the operating balance of the SIF. At some point, the SIF may not be able to reimburse at 100% all requests that qualify for reimbursement. Reimbursements from the SIF will be made in accordance with the provisions of the Act and commission §§116.11 and 116.12.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rules as proposed.

Ms. Bruce has also determined that for each year of the first five years the rules as proposed are in effect the public benefits anticipated as a result of enforcing the rules will be an improved system for pharmaceutical delivery within the first seven days after the injury, that will provide positive benefits to all participants in the system. The participants in the system are: injured employees, employers, insurance carriers and health care providers, including pharmacists.

The benefits of the proposed new rule to injured employees are the improved access to pharmaceutical services in the period immediately following their injuries.

The benefits of the proposed new rules to employers is the assurance that their injured employees are receiving appropriate and medically necessary medications in a timely manner for their compensable injury in anticipation of an early release-to-work as appropriate.

Insurance carriers will benefit from the proposed new rules because currently the carrier's first knowledge of an injury is sometimes the call from the pharmacy attempting to verify that benefits will be paid. In the current situation, the carriers are being asked to look at the issue of medical necessity while they are busy focusing on the compensability question. Carriers will now only need to confirm whether coverage exists and an injury has been reported. In addition, insurance carriers will benefit from the ability to seek reimbursement from the SIF for funds paid on claims determined not to be compensable claims.

Health care providers who provide pharmaceutical services will benefit from the security of payment for pharmaceutical services necessary for the initial seven days following the date of injury by following two simple steps (which can sometimes be completed at the same time).

There will be minimal anticipated economic costs to persons who are required to comply with the rules as proposed because employers and carriers are expected to verify coverage and confirm whether an injury has been reported under current rules while providers generally have to take the types of steps outlined in the rule in the normal course of providing pharmaceutical services.

Any additional cost to the HCP related to obtaining verification and confirmation should be offset by the required payment by the carrier for pharmaceutical services sufficient for the first seven days after the injury, regardless of any compensability issues. Although there is a potential for paying for up to seven days of pharmaceutical services on a claim later determined not to be compensable, this will not be an economic cost to employers and carriers because the payment is reimbursable by the SIF.

There will be no adverse economic impact on small businesses or on micro-businesses as a result of the proposed new rules. There will be no difference in the cost of compliance for small businesses and micro-businesses as compared to large businesses because the same basic processes and procedures apply to all entities regardless of size.

Comments on the proposal must be received by 5:00 p.m., September 9, 2002. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us* and then clicking on "Proposed Rules." This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Nell Cheslock at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staff's or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held on September 5, 2002, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the commission's Office of Executive Communication at (512) 440-5690 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us.*

The new rule is proposed under the following statutes: the Texas Labor Code §402.042, that authorizes the Executive Director to enter orders as authorized by the statute as well as to prescribe the form and manner and procedure for transmission of information to the commission; the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §406.010, that authorizes the commission to adopt rules necessary to specify the requirements for carriers to provide claims service and establishes that a person commits a violation if the person violates a rule adopted under this section; the Texas Labor Code §408.021(a), that states an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed; the Texas Labor Code §408.025, that requires the commission to specify by rule what reports a health care provider is required to file; the Texas Labor Code §408.028, as passed by the 77th Texas Legislature, that requires health care practitioners providing care to an employee to prescribe any necessary prescription drugs in accordance with applicable state law; the Texas Labor Code §413.002, that requires the commission to monitor health care providers and insurance carriers to ensure compliance with commission rules relating to health care including medical policies and fee guidelines; the Texas Labor Code §413.011, as passed by the 77th Texas Legislature, that requires the commission by rule to establish medical policies and guidelines relating to necessary treatments for injuries, and fees, designed to ensure the quality of medical care and to achieve effective medical cost control; the Texas Labor Code §413.012, that requires the commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; the Texas Labor Code §413.013 (1), (2), and (3), that require the commission by rule to establish a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; a program for the systematic monitoring of the necessity of the treatments administered and fees charged and paid for medical treatments or services including the authorization of prospective, concurrent or retrospective review under the medical policies of the commission to ensure the medical policies and guidelines are not exceeded; and a program to detect practices and patterns by insurance carriers in unreasonably denying authorization of payment for medical services requested or performed if authorization is required by the medical policies of the commission; the Texas Labor Code §413.0141, as passed by the 77th Texas Legislature, regarding initial pharmaceutical coverage; the Texas Labor Code §413.017, that establishes presumption of reasonableness of medical services; the Texas Labor Code §413.031, as passed by the 77th Texas Legislature, that entitles a party, including a health care provider, to a review of a medical service for

which authorization for payment has been denied or reduced; the Texas Labor Code §415.002, that establishes an administrative violation for an insurance carrier to: unreasonably dispute the reasonableness and necessity of health care, to violate a commission rule or to fail to comply with the Act; the Texas Labor Code §415.003, as passed by the 77th Texas Legislature, that establishes an administrative violation for a health care provider to: administer improper, unreasonable, or medically unnecessary treatment or services, to violate a commission rule, or to fail to comply with the act; and the Texas Labor Code §415.0035, that establishes an administrative violation for a provider or a carrier to violate any provision of the statute or rules.

The new rule is proposed under the Texas Labor Code §402.042, §402.061, §406.010, §408.021(a), §408.025, §408.028, §413.002, §413.011 §413.012, §413.013 (1) (2) and (3), §413.0141, §413.017, §413.031, §415.002, §415.003, §415.0035.

No other code, statute, or article is affected by this rule action.

§134.501. Initial Pharmaceutical Coverage.

(a) For injuries which occur on or after September 1, 2002, the insurance carrier (carrier) shall pay for specified pharmaceutical services sufficient for the first seven days following the date of injury if, prior to providing the pharmaceutical services, the health care provider (HCP) obtains both a verification of insurance coverage, and an oral or written confirmation that an injury has been reported, regardless of issues of liability, compensability, or reasonableness and medical necessity that the carrier may have. For purposes of this rule, specified pharmaceutical services are prescription drugs and over-the-counter medications prescribed by a doctor.

(1) In determining the first seven days following the injury, the date of the injury is not counted. The first day after the date of injury shall be counted as "day one." The last day of the seven-day period shall be known as "day seven."

(2) If the pharmaceutical services are provided after day one, the carrier's reimbursement under this section is limited to the date the pharmaceutical services were actually provided through day seven. (Example: The pharmaceutical services were provided on day four. The carrier's liability for payment under this section would be for pharmaceutical services in an amount prescribed that would be the quantity sufficient for days four, five, six and seven.)

(3) Payment for the specified pharmaceutical services shall be in accordance with §134.503 of this title (relating to Reimbursement Methodology). The dispensing fee for the initial prescription shall not be denied, prorated, or reduced even if the HCP provided pharmaceutical services beyond the first seven days following the date of injury and the carrier disputes or denies the pharmaceutical services beyond the first seven days following the date of injury.

(b) The carrier may be eligible for reimbursement from the subsequent injury fund (SIF) for payments made under subsection (a) as provided in Chapter 116 of this title.

(c) The HCP can verify insurance coverage and confirm the existence of a report of an injury by calling the employer or the carrier. Upon request, the employer and/or the carrier shall verify coverage and confirm any report of an injury. For verifying insurance coverage, the HCP can also review the Commission's internet-based coverage verification system.

(1) The HCP shall document verifications and confirmations not obtained in writing by indicating how the verification or confirmation was obtained (date obtained, from whom, etc.).

(2) The HCP shall affirm on the bill for the pharmaceutical services, in the form and manner prescribed by the commission, that the HCP verified that there is insurance coverage and confirmed that an injury has been reported.

(d) Notwithstanding any other provision of this section, the HCP may dispense prescription or nonprescription medications in the amount ordered by the prescribing doctor in accordance with applicable state and federal law (not to exceed the limits imposed by §134.502 of this title (relating to Pharmaceutical Services)).

(e) The HCP and carrier may voluntarily discuss approval of pharmaceutical services beyond the seven days following the date of injury as provided in Texas Labor Code §413.014(e) and §134.600 of this title (relating to Preauthorization, Concurrent Review, and Voluntary Certification of Health Care).

(f) Communication is important to ensure prompt delivery of pharmaceutical services.

(1) Injured employees (employees) are encouraged to immediately report their injury to their employer.

(2) Employees are encouraged to ask for, and employers to provide, a written statement that confirms an injury was reported to the employer and identifies the date of injury (as reported by the employee) and the employer's insurance carrier. Verifying that there is insurance coverage and/or confirming that an injury was reported does not waive the employer's right to contest compensability under Texas Labor Code §409.011 should the carrier accept liability for the payment of benefits.

(3) The carrier's verification of coverage and/or confirmation of a reported injury does not waive the insurance carrier's right to further review the claim under Texas Labor Code §409.021 and §124.3 of this title (relating to Investigation of an Injury and Notice of Denial/Dispute).

This 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 July 26, 2002.

TRD-200204614
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 804-4287

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CHAPTER 164. HAZARDOUS EMPLOYER PROGRAM

28 TAC §164.9

The Texas Workers' Compensation Commission (the commission) proposes amendments to §164.9, concerning Approval of Professional Sources for Safety Consultations. The amendments are proposed to eliminate the requirement to attend annual refresher training to remain on the active approved professional source list and replace it with a biennial requirement.

The *Texas Register* published text shows words proposed to be added to or deleted from the current text, and should be read to determine all proposed changes.

Subsection (e) of the current rule requires approved professional sources to attend an update seminar prior to December 31 of

each year. This requirement was instituted during a period of rapid change in the hazardous employer program. Since the program has not undergone substantive changes for several years, the "update seminar" has become more refresher training than presentation of new information.

After the current Chapter 164 rules went into effect in January 1999, private employers were no longer required to obtain a safety consultation from an approved professional source. This drastically reduced the number of consultations required under the program and, thus, the amount of work for approved professional sources. Many approved professional sources live outside of Texas and must travel to the update seminars each year to maintain their designation.

This proposed change would relax a requirement on approved professional sources that has become unnecessarily stringent. In addition, the change will allow approved professional sources to obtain required training on the Internet when this becomes available.

Robert Marquette, Workers' Health and Safety director has determined that for the first five-year period the proposed rule is in effect there will be fiscal implications for state or local governments as a result of enforcing or administering the rule. Adoption of this rule will result in decreased revenue to the Commission from reduced seminar tuition, but will also result in decreased travel and other costs associated with presenting the update seminars. The net result should be minimal.

Local government and state government as a covered regulated entity will be impacted in the same manner as described later in this preamble for persons required to comply with the rule as proposed.

Mr. Marquette has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be improved customer service for approved professional sources and decreased costs for insurance carriers.

There will be no anticipated economic costs to persons who are required to comply with the rule as proposed. In fact, approved professional sources will realize a cost savings as a result of the proposed rule change.

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

Comments on the proposal must be received by 5:00 p.m., September 9, 2002. You may comment via the Internet by accessing the commission's website at *www.twcc.state.tx.us.* and then clicking on "Proposed Rules" This medium for commenting will help you organize your comments by rule chapter. You may also comment by emailing your comments to *RuleComments@twcc.state.tx.us* or by mailing or delivering your comments to Nell Cheslock at the Office of the General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491.

Commenters are requested to clearly identify by number the specific rule and paragraph commented upon. The commission may not be able to respond to comments that cannot be linked to a particular proposed rule. Along with your comment, it is suggested that you include the reasoning for the comment in order for commission staff to fully evaluate your recommendations.

Based upon various considerations, including comments received and the staffs or commissioners' review of those comments, or based upon the commissioners' action at the public meeting, the rule as adopted may be revised from the rule as proposed in whole or in part. Persons in support of the rule as proposed, in whole or in part, may wish to comment to that effect.

A public hearing on this proposal will be held on September 5, 2002, at the Austin central office of the commission (Southfield Building, 4000 South IH-35, Austin, Texas). Those persons interested in attending the public hearing should contact the Commission's Office of Executive Communication at (512) 804-4430 to confirm the date, time, and location of the public hearing for this proposal. The public hearing schedule will also be available on the commission's website at *www.twcc.state.tx.us.*

The amendment is proposed under the Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code, §§411.041-411.068, which require the commission to identify hazardous employers and develop, implement, and enforce accident prevention programs; and Texas Insurance Code, Article 5.76-3, Section 10, which authorizes and sets out the provisions for the Texas Mutual Insurance Company.

This proposed amendment is proposed under Texas Labor Code §402.061, §§411.041-411.068, and Texas Insurance Code, Article 5.76-3, Section 10.

No other code, statute, or article is affected by this rule action.

§164.9. Approval of Professional Sources for Safety Consultations.

(a) An individual seeking to become an approved professional source to provide safety consultations under the Hazardous Employer Program shall apply to the [~~division~~] commission in the form and manner prescribed by the commission. Applications will be processed by the [~~division~~] commission within seven days of receipt of all required documentation.

(b) A total of ten years active practice in the occupational health and safety profession may qualify an applicant as an approved professional source at the discretion of the [~~division~~] commission.

(c) The individual who does not qualify under subsection (b) of this section may qualify as follows. To be considered by the [~~division~~] commission, an individual must have at least five years active practice within the last eight years in the occupational health and safety profession. In addition to the active occupational health and safety practice, the individual must meet at least one of the following qualifications:

(1) must have a bachelor's degree or advanced degree in safety, science, or engineering from an accredited college or university or other degrees with a minimum of 55 total semester hours in math, science and/or engineering from an accredited college or university;

(2) must be a professional engineer registered in Texas;

(3) must be a certified safety professional certified by the Board of Certified Safety Professionals (BCSP);

(4) must be a certified industrial hygienist certified by the American Board of Industrial Hygiene (ABIH); or

(5) must have a certification by another certifying organization which is approved by the [~~division~~] commission.

(d) Occupational Health and Safety Experience is defined as the personal involvement in the development and implementation of safety programs where the individual has been assigned the duty and responsibility in one or more of the eleven occupational health and

safety categories listed in paragraphs (1)-(11) of this subsection. All activities which do not fall within any of the 11 categories are not considered safety/health or environmental functions. Occupational health and safety experience will be verified with the employer or immediate supervisor listed by the applicant. The eleven occupational health and safety categories are:

(1) hazard identification;

(2) hazard evaluation;

(3) hazard control design;

(4) hazard control verification;

(5) safety/health program design;

(6) safety/health program evaluation;

(7) safety/health communication;

(8) investigation and statistical reporting;

(9) safety/health education and training;

(10) supervision of other safety and health professionals; and

(11) environmental protection.

(e) Applicants who meet the requirements of either subsection (b) or (c) of this section must, in addition, complete an approved professional source seminar conducted by the [~~division~~] commission prior to their approval as an approved professional source. Approved professional sources shall attend an approved professional source update seminar prior to December 31 of the [~~each~~] year following their [~~the~~] initial [~~seminar~~] approval and every other year, thereafter, in order to remain on the active approved professional source list. Required training may be accomplished by means of an Internet program approved by the commission. In the case of major changes to the Hazardous Employer Program, approved professional sources shall be notified by the commission and will be required to obtain training within six months of the notification.

(f) An individual who meets the requirements of subsections (b) or (c), and (e) of this section, shall be approved as an approved professional source to provide safety consultations for hazardous employers.

(g) If an applicant is not approved, the [~~division~~] commission shall notify the applicant in writing and specify the basis of the denial.

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204613
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 804-4287

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.309, §3.350

(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 Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Comptroller of Public Accounts proposes the repeal of §3.309 and §3.350, concerning electrical transcriptions, recording studios, producers; and motion pictures. These sections are being repealed in order to simplify the consolidation of related sections into a single section. The substance of the current §3.309 and §3.350 will be included in a new §3.350, concerning motion pictures and audio recordings which will be submitted at a later time.

James LeBas, Chief Revenue Estimator, has determined that repeal of the rules will have no significant fiscal impact on the state or units of local government.

Mr. LeBas also has determined that there will be no cost or benefit to the public from the repeal of these rules. The repeals are adopted under the Tax Code, Title 2, and do not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeals.

Comments on the repeals may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

These repeals are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The repeals implement Tax Code, §111.002.

§3.309. Electrical Transcriptions, Recording Studios, Producers.
§3.350. Motion Pictures.

This 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 July 22, 2002.

TRD-200204516
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 475-0387

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34 TAC §3.367

The Comptroller of Public Accounts proposes a new §3.367, concerning timber items. The new section is proposed to implement Tax Code, §151.3162, which allows a partial refund or credit of tax paid on certain timber items that are purchased from October 1, 2001 through December 31, 2007. Effective January 1, 2008, these timber items will be exempt from sales and use taxes. The proposed rule provides information regarding the partial refund

or credit for timber items and the exemption of timber items in 2008. In addition, the proposed rule contains information regarding the amendment of Tax Code, §151.317, which exempts natural gas and electricity used in timber operations, effective October 1, 2001. Finally, the proposed rule addresses the October 1, 2001, repeal of Tax Code, §151.3161, which exempts the first $50,000 of the purchase price of certain machinery and equipment used in timber operations.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr. LeBas 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 in providing new information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §§151.3161, 151.3162, and 151.317.

§3.367. Timber Items. (Tax Code, §151.3162 and §151.317)

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

(1) Equipment--An apparatus, device, hand tool, or simple machine. The term does not include motor vehicles licensed for highway use. Examples include axes, handsaws, chain saws, ropes, tree measurement devices, harnesses for tree climbing, eye protection goggles, ear protection devices, above-ground sprinkler systems, equipment used to drill holes for planting, harvesters, slasher-merchandisers, debarkers, delimbers, grapples, log stackers, feller bunchers, loaders, skidders, tractors, and bulldozers. A computer or software program may qualify, if it is used exclusively in the production of timber. For example, a computer used exclusively to measure or track the growth of the trees to determine harvest time is a timber item. However, computers and software used in business accounting, bookkeeping, word processing, preparation of payrolls and employee evaluations, or other non-production activities are not timber items. The term does not include furniture, office supplies, or office equipment.

(2) Machinery--A powered-operated machine. The term does not include motor vehicles licensed for highway use.

(3) Original producer--a person who:

(A) harvests timber that the person owns and continues to own until the timber is processed, packed, or marketed; or

(B) is the grower of the timber, exercises predominant operational control over the growth of the timber, and bears the risk of loss of investment in the timber.

(4) Pollution control equipment--Machinery and equipment that are used by an original producer to control pollution that results from the processing, packing, or marketing of timber products by the original producer.

(5) Production of timber--Activities to prepare the production site or to plant, cultivate, or harvest commercial timber that will be sold in the regular course of business.

(b) Qualifying items. Persons may claim a partial refund or credit for Texas sales or use taxes paid on purchases of the following items:

(1) seedlings of trees commonly grown for commercial timber. Examples of trees commonly grown for commercial timber include hardwood or pine trees;

(2) defoliants, desiccants, fertilizers, fungicides, herbicides, and insecticides that are exclusively used in the production of timber for sale;

(3) machinery or equipment that is exclusively used in the production of timber for sale, including accessories, repair or replacement parts, and lubricants for the machinery or equipment;

(4) tangible personal property sold or used as a component of an underground irrigation system that is exclusively used in the production of timber for sale. For example, a contractor who has a lump-sum contract to install an underground irrigation system as an improvement to realty is the consumer of the incorporated materials and must pay sales tax on purchases. As authorized by Tax Code, §151.3162(b)(2), the contractor may request a partial refund or credit for tax that the contractor paid on the qualifying components of the irrigation system. For further information on contracts to improve real property, see §3.291 of this title (relating to Contractors); and

(5) machinery or equipment, including pollution control equipment, that the original producer uses to process, pack, or market timber product, if the machinery or equipment meets the requirements enumerated in subsection (d)(1) of this section. Examples of eligible machinery and equipment include stacking sticks used to dry the lumber, forklifts, and conveyors.

(c) Partial refund or credit for sales or use tax paid on qualifying items. A person who, during the period beginning October 1, 2001, and ending December 31, 2003, pays Texas sales or use tax on the purchase, lease, or rental of a qualifying item as set out in subsection (b) of this section may either request a partial refund of the tax directly from the comptroller or take a credit on a sales tax return for a portion of the tax. The amount of the partial refund or credit is determined by the date that the qualifying item is purchased, leased, or rented, as provided in paragraphs (1)-(3) of this subsection. At the time of the purchase, lease, or rental, the purchaser must pay sales or use tax to the retailer and may not issue an exemption certificate to the retailer. A purchaser must accrue and pay use tax to the comptroller on qualifying items purchased out-of-state for use in Texas (see §3.346, concerning Use Tax). The purchaser may take the partial credit on the sales and use tax return when the purchaser reports and pays the tax to the comptroller. The amount of credit will be determined by the date on which the purchaser brings the qualifying items into this state.

(1) If a qualifying item is purchased, leased, or rented from October 1, 2001 through December 31, 2003, then the purchaser is entitled to a refund or credit in an amount equal to 33% of the tax paid on the item.

(2) If a qualifying item is purchased, leased, or rented from January 1, 2004 through December 31, 2005, then the purchaser is entitled to a refund or credit in an amount equal to 50% of the tax paid on the item.

(3) If a qualifying item is purchased, leased or rented from January 1, 2006 through December 31, 2007, then the purchaser is entitled to a refund or credit in an amount equal to 75% of the tax paid on the item.

(4) A purchaser may seek a refund or take a credit for tax paid on exempt timber items within the following limitations:

(A) A purchaser who elects to take a credit must claim the credit on a sales or use tax return for a report period that ends not later than the first anniversary of the date that the timber item was purchased, leased, or rented. For example, a quarterly filer who purchases and pays tax on a qualifying item on October 2, 2001, may take the 33% credit on any quarterly return up to and including the return for the quarter that ends September 30, 2002.

(B) A purchaser who elects to claim a refund directly from the comptroller must submit a written claim not later than December 31 of the calendar year immediately following the year in which the tax was paid. For example, a purchaser who purchases a timber item and pays tax on October 2, 2001, must submit a refund claim for 33% of tax paid by December 31, 2002.

(C) A purchaser who fails to take a credit on a return before the expiration of the limitation period provided in subparagraph (A) of this paragraph may still request a refund directly from the comptroller within the limitation period provided in subparagraph (B) of this paragraph.

(5) Interest. Sales or use taxes paid on timber items that are purchased, leased, or rented from October 1, 2001 through December 31, 2007, are not taxes paid in error, and no interest under Tax Code, §111.064, is due on partial refunds or credits taken on timber items.

(6) Taxable services. Sales or use taxes paid on maintenance, repair, or remodeling performed on qualifying machinery or equipment from October 1, 2001 through December 31, 2007, are not eligible for the partial refund or credit. A purchaser may claim a partial refund or take a credit for tax paid on separately stated charges for parts, accessories, and lubricants for qualifying machinery or equipment.

(d) Original producer.

(1) The original producer may qualify for the partial refund or credit only if:

(A) the processing, packing, or marketing occurs at or from a location operated by the original producer;

(B) at least 50% of the value of the timber products processed, packed, or marketed at or from the location during the most recent calendar year is attributable to products produced by the original producer and not purchased or acquired from others; and

(C) the original producer does not for consideration process, pack, or market timber products that belong to others, unless the value of the product that belongs to another person is 5.0% or less of the total value of the timber products processed, packed, or marketed by the original producer.

(2) Two or more corporations that operate timber activities on the same or adjacent tracts of land and that are entirely owned by the same individual or a combination of the individual, the individual's spouse, and the individual's children may qualify as an original producer for the purposes of this paragraph.

(e) Exemption for timber items. After December 31, 2007, the purchase, lease, or rental of timber items will be exempt from sales or use tax, and a purchaser may issue a retailer a properly completed exemption certificate in lieu of paying tax on qualifying items that are purchased, leased, or rented after December 31, 2007. After December 31, 2007, taxable services performed on qualifying items will be exempt under Tax Code, §151.3111.

(f) Manufacturing. A person who processes or fabricates tangible personal property to be sold is a manufacturer and may be entitled to manufacturing exemptions provided by Tax Code, 151.318. See §3.300 of this title (relating to Manufacturing; Custom Manufacturing; Fabricating; Processing) for information on tax exemptions for equipment and supplies used in manufacturing. For information regarding wrapping and packaging supplies purchased by manufacturers, see §3.314 of this title (relating to Wrapping, Packing, Packaging Supplies, Containers, Labels, Tags, and Export Packers).

(g) Gas and electricity exemption. Effective October 1, 2001, natural gas and electricity used in timber operations are exempt from sales and use taxes. See §3.295 of this title (relating to Natural Gas and Electricity) for further information regarding the exemption of natural gas and electricity.

(h) Buildings. Buildings, structural components of buildings, and/or the materials used to build, construct, or fabricate buildings are not timber items and are taxable.

(1) Buildings include any structures or edifices enclosing a space within their walls, and usually are covered by a roof, the purpose of which may be to provide storage, shelter, or housing, or to provide work, office, or sales space. Examples of buildings include residential quarters, offices, storage facilities, and warehouses.

(2) A building or structure that is essentially an item of equipment or machinery necessary for timber production may be considered timber equipment if it is specifically designed for such use and cannot be economically used for any other purpose. For example, a commercial greenhouse is timber equipment if it is used to grow seedlings of trees commonly grown for commercial timber.

(3) Pollution control equipment and machinery or equipment used in processing, packing, or marketing by an original producer, may qualify even if the machinery and equipment are affixed to real property. For a timber producer to qualify for sales tax refunds or credits on qualifying items that are installed under a contract to improve real property, the timber producer must enter into a separated contract. Additionally, the contract must separately state the charges for the qualifying items from the charges for other tangible personal property. See §3.291 of this title (relating to Contractors) for information regarding new construction contracts. See §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance) for information regarding nonresidential real property repair, remodeling, or restoration.

(i) Repeal of previous exemption. Effective October 1, 2001, the exemption in Tax Code, §151.3161, that took effect on October 1, 1995, is repealed. That provision allowed a tax exemption for the first $50,000 of the purchase price of each complete unit of machinery or equipment used exclusively in a commercial timber operation to prepare the site, plant, cultivate, or to harvest timber in the regular course of business.

This 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 July 25, 2002.

TRD-200204570

Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 475-0387

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CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER E. CLAIMS PROCESSING--PURCHASE VOUCHERS

34 TAC §5.57

The comptroller of public accounts proposes amendments to §5.57, concerning the use of credit cards by state agencies. The purposes of the amendments are as follows.

First, the amendments will reflect the legislature's abolishment of the General Services Commission and creation of the Texas Building and Procurement Commission (TBPC) in 2001.

Second, the amendments will reflect the legislature's 1999 addition of charge cards to the statute that previously authorized state agencies to use credit cards to pay for purchases. The amendments will result in the section using the term "payment card" when referring to either credit cards or charge cards.

Third, the amendments will authorize the comptroller to allow an institution of higher education to contract directly with a payment card issuer and authorize any state agency to participate in that contract. TBPC will retain the authority to contract directly with a payment card issuer on behalf of any state agency that chooses to participate in the contract.

Fourth, the amendments will make technical and non-substantive improvements to the section.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the amendments will be in effect, there will be no foreseeable implications relating to costs or revenues of the state or local governments.

Mr. LeBas also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of adopting the amendments will be in providing more accurate information about and increased flexibility in the use of payment cards by state agencies to pay for purchases. The proposed amendments will not have an adverse effect on small businesses or micro-businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendments.

Comments on the proposal may be addressed to Joani Bishop, Manager of Claims Division, P.O. Box 13528, Austin, Texas 78711. If a person wants to ensure that the comptroller considers and responds to a comment made about this proposal, then the person must ensure that the comptroller receives the comment not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears. If the 30th day is a state or national holiday, Saturday, or Sunday, then the first workday after the 30th day is the deadline.

The amendments are proposed under Government Code, §403.023(b), which authorizes the comptroller to adopt rules relating to the use of credit or charge cards by state agencies to pay for purchases.

The amendments implement Government Code, §403.023(b) - (e).

§5.57. Use of Payment [~~Credit~~] Cards by State Agencies.

(a) Definitions. In [~~The following words and terms, when used in~~] this section:[~~, have the following meanings, unless the context clearly indicates otherwise.~~]

(1) "Commission" means the Texas Building and Procurement [~~Commission--The General Services~~] Commission.

(2) "Consulting service" has the meaning assigned by §5.54 of this title (relating to Consulting Services Contracts) [~~Consulting service--A study conducted for a state agency or advice provided to a state agency under a contract that does not involve the traditional relationship of employer and employee. The term does not include a routine service that is necessary to the functioning of a state agency's programs~~].

[~~(3) Credit card--A credit card issued to an officer or employee of a state agency for the sole purpose of allowing the officer or employee to purchase goods or services for the agency.~~]

(3) [~~(4)~~] "Executive director" means the [~~Executive director--The~~] individual who is the chief administrative officer of a state agency. The term excludes a member of a governing body.

(4) [~~(5)~~] "Executive head" means: [~~Executive head--~~]

(A) the elected or appointed state official who is authorized by law to administer a state agency that [~~if the agency~~] is not headed by a governing body; or

(B) the executive director of a state agency that [~~if the agency~~] is headed by a governing body.

(5) "Institution of higher education" has the meaning assigned by the Education Code, §61.003, other than a public junior college.

(6) "Payment card" means a credit or charge card issued to an officer or employee of a state agency for the purpose of allowing the officer or employee to purchase goods or services for the agency.

(7) "Payment card purchase" means the use of a payment card to pay for the purchase of a good or a service.

(8) [~~(6)~~] "State agency" means: [~~State agency--~~]

(A) a board, commission, department, or other agency in the executive branch of state government that is created by the constitution or a statute of this state, including an institution of higher education [~~as defined by the Education Code, §61.003, other than a public junior college~~];

(B) the legislature or a legislative agency; or

(C) the supreme court [~~Supreme Court of Texas~~], the court [~~Court~~] of criminal appeals [~~Criminal Appeals of Texas~~], a court of appeals, or a state judicial agency.

(b) Applicability of this section. Except as provided in subsection (c) of this section, this section applies to a state agency's use of a payment [~~credit~~] card regardless of the type of funds the agency uses to pay the payment [~~credit~~] card issuer.

(c) Exemptions.

(1) This section does not apply to a state agency if a law other than the Government Code, §403.023, specifically authorizes, requires, prohibits, or otherwise regulates the agency's use of a payment [~~credit~~] card.

(2) This section does not apply to the extent its application would affect a contract in which a state agency is a party. This paragraph applies only if the contract was in effect on September 1, 1993.

(3) This section does not apply to the extent its application would violate a constitutional prohibition against a law that impairs a contractual obligation.

(4) This section does not apply to the extent necessary to avoid an irreconcilable conflict with a federal law or regulation.

(5) This section does not apply to the use of a payment [~~credit~~] card to pay for a travel expense [~~expenses~~] incurred by a state officer or employee while conducting official state business.

(d) Effect of noncompliance with this section. The comptroller may suspend or terminate a state agency's authority to use a payment card [~~credit cards~~] if the comptroller determines that the agency or an officer or employee of the agency has violated this section.

(e) Procurement of payment [~~credit~~] card services by the commission or an institution of higher education.

(1) The commission may contract with a payment [~~credit~~] card issuer on behalf of any state agency that chooses to participate in the contract [~~agencies~~].

(2) The comptroller may authorize an institution of higher education to contract with a payment card issuer on behalf of any state agency that chooses to participate in the contract. The institution may not enter into the contract without the comptroller's authorization.

(3) A state agency that is participating in a contract between the commission and a payment card issuer may start participating in a contract between an institution of higher education and a payment card issuer if:

(A) the comptroller approves of the agency's participation in the contract involving the institution; and

(B) the agency ceases participation in the contract involving the commission.

(4) A state agency that is participating in a contract between an institution of higher education and a payment card issuer may start participating in a contract between the commission and a payment card issuer if:

(A) the comptroller approves of the agency's participation in the contract involving the commission; and

(B) the agency ceases participation in the contract involving the institution.

(5) [~~(2)~~] A state agency may not use a payment [~~credit~~] card to pay for a purchase unless the [~~credit~~] card was issued under a contract between a payment [~~the commission and the credit~~] card issuer and either the commission or an institution of higher education.

(6) [~~(3)~~] A state agency may begin making payment [~~using a credit~~] card [~~to pay for~~] purchases only after the agency has complied with the [~~commission's~~] procedural requirements of:[~~.~~]

(A) the commission, if the agency is participating in a contract between the commission and a payment card issuer; or

(B) an institution of higher education, if the agency is participating in a contract between the institution and a payment card issuer.

(f) Adoption of procedures by state agencies. A state agency shall adopt reasonable procedures governing the issuance and[~~,~~] security of payment cards[~~,~~] and the use of those [~~credit~~] cards by the agency's officers and employees. Upon request, the agency shall make the procedures available to the comptroller for review.

(g) Prohibited uses of payment [~~credit~~] cards. A state agency may not use a payment [~~credit~~] card and may not reimburse an officer or employee for the use of a payment [~~credit~~] card for:

(1) a purchase of a personal nature or any other purchase not connected with official state business;

(2) a cash advance;

(3) a purchase of a consulting service;

(4) a purchase of a good [~~goods~~] or a service [~~services~~] that may not be purchased without the prior approval of another state agency;

(5) a purchase that the comptroller audits before payment; or

(6) a purchase from a vendor if a payment to it is [~~would be~~] prohibited by:

(A) [~~the~~] Government Code, §403.055 or §2107.008; [~~§481.0841, the~~]

(B) Education Code, §57.48, or §57.482; [~~the Human Resources Code, §76.0041.~~] or

(C) that chooses to participate in the contract.

(h) Applicability of purchasing requirements. The use of a payment [~~credit~~] card to pay for a purchase does not automatically exempt a state agency or its officers and employees from any [~~the~~] purchasing requirement [~~requirements~~] of state law or the commission.

(i) Payments to payment [~~credit~~] card issuers. A state agency shall pay a payment [~~credit~~] card issuer through an electronic funds transfer.

(j) Refunds. A state agency may not accept a cash refund for a purchase if the agency paid for the purchase with a payment [~~credit~~] card.

(k) Lost or stolen payment [~~credit~~] cards. The state employee that had custody of a payment [~~credit~~] card immediately before it was lost or stolen shall report the loss or theft to the payment [~~credit~~] card issuer according to its requirements [~~instructions~~].

(l) Disputed charges. A state agency shall dispute any incorrect charge that appears on an invoice the agency receives from a payment [~~If a credit~~] card issuer. When disputing the charge, the [~~sends an invoice that a state~~] agency [~~believes has an incorrect charge, then the agency~~] shall comply with applicable law and [~~report the error to the issuer. The agency must report the error according to~~] the issuer's [~~deadline, instructions, and other~~] requirements.

(m) Taxes. A state agency or a state employee shall properly claim any [~~an~~] available exemption from paying a state or federal tax that is assessed on a payment card purchase [~~of goods or services by credit card~~].

(n) Responsibilities and notification of state employees.

(1) A state employee shall ensure that each of the employee's payment card purchases [~~with a credit card~~] comply with applicable state law and this section.

(2) The executive head of a state agency shall notify [~~is responsible for notifying~~] the agency's employees about the requirements of this section.

(o) Fiscal year determination. The fiscal year that must be charged for a purchase is not affected by the [~~paying state agency's~~] use of a payment [~~credit~~] card to pay for [~~make~~] the purchase. For example, [~~if~~] a state agency that pays [~~purchases a service with~~] a payment [~~credit~~] card issuer for a service purchased by the agency must charge[~~, then~~] the payment [~~to the credit card issuer for the service must be charged~~] to the fiscal year in which the service was rendered.

(p) Prohibition against excess obligations. A state agency that uses a payment [~~credit~~] card to pay for a purchase should be careful not to violate any provision in the General Appropriations Act about the incurrence of excess obligations.

(q) Purchase document and receipt requirements.

(1) A purchase document that a state agency submits to the uniform statewide accounting system [~~Uniform Statewide Accounting System (USAS)~~] for a payment to a payment [~~credit~~] card issuer must comply with the comptroller's general requirements for the submission of those documents. In addition, the document must:

[~~(A) specify the complete name and payee identification number of:~~]

~~*(i)* the credit card issuer if a summary expenditure object code is used; or~~]

~~*(ii)* the vendor from which the purchase was made if a summary expenditure object code is not used;~~]

(A) [~~(B)~~] provide the transaction charge and the appropriate Texas identification [~~payee~~] number on the detail lines;

(B) [~~(C)~~] provide the Texas identification [~~payee~~] number and name of the payment [~~credit~~] card issuer on the address line; and

(C) [~~(D)~~] contain any other information the comptroller considers [~~deems~~] necessary.

(2) A state agency shall keep in its files any receipt [~~the receipts~~] that a vendor issues to the agency for a payment card purchase [~~by credit card~~]. The receipt [~~receipts~~] must contain a description of the good [~~goods~~] or service [~~services~~] purchased that is sufficient to support the expenditure object code used by the agency. The agency shall make the receipt [~~receipts~~] available to the comptroller 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 July 23, 2002.

TRD-200204530
Martin Cherry
Deputy General Counsel for Taxation
Comptroller of Public Accounts
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 475-0387

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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 41. INSURANCE PROGRAMS SUBCHAPTER C. TEXAS SCHOOL EMPLOYEES GROUP HEALTH

34 TAC §41.40, §41.44

The Teacher Retirement System of Texas (TRS) proposes new §41.40 and §41.44 concerning the Texas School Employees Uniform Group Health Coverage Program ("Program"). The proposed §41.40 relates to insurance coverage under the Program for eligible individuals who are placed on leave-without-pay status by their employers. The proposed §41.44 relates to payment of additional support for certain school districts paying social security taxes. The proposed §41.40 and §41.44 have been simultaneously adopted on an emergency basis and are published in this issue of the *Texas Register*.

In accordance with Insurance Code article 3.50-7, the proposed §41.40 establishes criteria for continuation of coverage under the Program for eligible individuals employed by eligible entities if they are covered under the Program and are placed on leave-without-pay status. In addition, the proposal establishes certain criteria for enrollment of otherwise eligible individuals who are on leave-without-pay status at the time their employer first becomes a participating entity under the Program. The proposed §41.40 also establishes timelines for termination of coverage that continues in accordance with the section. In addition to establishing these criteria, the purpose of the proposed section is to provide notice to participating entities and their employees of these requirements.

In accordance with Insurance Code article 3.50-7 and Insurance Code article 3.50-9, the proposed §41.44 sets forth the procedures and timelines for eligible school districts to notify TRS of amounts payable to them under the law. The proposal provides standards for calculation of the amounts payable, sets forth the TRS process for accepting or rejecting statements and remitting funds, and provides that TRS may take appropriate action to recover any amounts that were not properly remitted. In addition, the proposed §41.44 describes the procedure for allocating remittance among eligible districts if appropriate amounts are insufficient to cover all statements submitted. In addition to establishing these procedures and standards, the purpose of the proposed section is to notify eligible school districts of these requirements.

Ronnie Jung, Deputy Director, has determined that for each year of the first five-year period the sections are in effect there will be no foreseeable fiscal implications to state and local governments as a result of enforcing or administering the sections. There is no foreseeable effect on local employment or local economies as a result of the proposed sections. There is no anticipated adverse economic effect on small businesses or micro-businesses as a result of compliance with the proposed new sections.

Mr. Jung has also determined that for each year of the first five years the new sections are in effect the public benefit anticipated is that interested parties such as participating entities and their employees will have notice of these requirements. In addition, the sections will comply with the statutory provisions for adoption of rules relating to the Program. Mr. Jung has determined that there are no anticipated economic costs to persons required to comply with the proposed sections.

Comments on the proposal may be submitted to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than 30 days after publication of the sections for proposal.

The new sections are proposed under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of the Teacher Retirement System to adopt rules for, among

other things, the transaction of business of the board. The new sections are also proposed under House Bill 3343, which was passed by the 77th Legislature, 2001, including Insurance Code article 3.50-7, which authorizes TRS to adopt rules to administer the Program. The proposed §41.44 is also proposed under Insurance Code article 3.50-9, §6, which authorizes TRS to adopt rules as necessary to implement that section. Insurance Code article 3.50-7, §3(c) further authorizes TRS, as trustee, to "adopt rules relating to the program as considered necessary by the trustee."

There are no other codes affected.

§41.40. Coverage Continuation While on Leave Without Pay.

(a) Full-time and part-time employees covered under the TRS-ActiveCare program who are placed on leave-without-pay-status by a participating entity in accordance with that entity's personnel policies, and their eligible covered dependents, may continue participation in the TRS-ActiveCare program in accordance with this section under the coverage plan in effect the day before leave without pay begins. For purposes of this section, "leave-without-pay status" includes unpaid leave taken in accordance with the Family and Medical Leave Act of 1993 or other applicable law.

(b) Individuals who were placed on leave-without-pay status by a participating entity in accordance with that employer's personnel policies or applicable law prior to the date the employer became a participating entity may enroll in the TRS-ActiveCare program in accordance with §41.36 of this title (relating to Enrollment Periods for the TRS-ActiveCare Program) if they were covered by the participating entity's health coverage plan on the day before the employer became a participating entity and provided they would meet eligibility requirements under §41.34 of this title (relating to Eligibility for Coverage under the Texas School Employees Uniform Group Health Coverage Program) but for their leave-without-pay status.

(c) Individuals who were placed on leave-without-pay status by a participating entity in accordance with that employer's personnel policies or applicable law prior to the date the employer became a participating entity, but who were not covered by the participating entity's health coverage plan on the day before the employer became a participating entity, may enroll in the TRS-ActiveCare program in accordance with §41.36 of this title when they return to work and provided they meet eligibility requirements under §41.34 of this title.

(d) Unless otherwise required by applicable law, continued coverage for an individual described in subsection (a) or (b) of this section shall terminate the earlier of:

(1) 11:59 p.m. Central Time on the last calendar day of the month for which premiums are paid;

(2) 11:59 p.m. Central Time on the last calendar day of the month in which the employment of the covered individual, or the individual under whom a dependent qualified for coverage, terminates as determined by the participating entity, except as otherwise provided under §41.39 of this title (relating to Coverage for Individuals Changing Employers);

(3) 11:59 p.m. Central Time on the last calendar day of the month in which a covered individual, or the individual under whom a dependent qualified for coverage, is no longer eligible for coverage under the TRS-ActiveCare Program under §41.34 of this title due to requirements unrelated to leave-without-pay status; or

(4) 11:59 p.m. Central Time on the last calendar day of the sixth month following the month in which coverage continuation under this section began for either the covered individual, or for the individual under whom a dependent qualified for coverage.

§41.44. Payment of Additional Support for Certain School Districts Paying Social Security Taxes.

A school district eligible for additional support payments under Insurance Code article 3.50-9 §6 ("Eligible District") must notify TRS in writing by September 1, 2002 of its eligibility for the payments. The Eligible District must submit a quarterly statement to TRS in the form prescribed by TRS reflecting the taxes paid by the Eligible District under Section 3111(a), Internal Revenue Code of 1986, on the portion of the $1000 supplement received by individuals employed by the Eligible District as compensation during the applicable quarter. Such statements shall be submitted to TRS beginning with the calendar quarter ending November 30, 2002 and must be submitted on or after the first day, and no later than the last day, of the month following the applicable quarter. To the extent amounts appropriated for this purpose are available, TRS will generally remit amounts payable under Insurance Code article 3.50-9 §6 to the Eligible District within 30 days after receipt of a quarterly statement submitted in accordance with this section if TRS does not seek verification of, or otherwise dispute, information on the statement. TRS may dispute, or seek verification of, information on any quarterly statement at any time. An Eligible District will consider the $1000 supplement to be the last compensation received by an individual in a calendar year with regard to the social security wage base. An Eligible District may not include any amount that exceeds, or will exceed, the social security wage base in its calculations of taxes paid. In the event cumulative statements submitted by all Eligible Districts for reimbursement exceed the amount appropriated for this purpose, TRS will make payments based on its calculation of an Eligible District's proportional share of the remaining available amount. TRS may make any appropriate increase or decrease in funds that would otherwise be payable to an Eligible District. If necessary, TRS may institute other action to recover amounts an Eligible District was not entitled to receive.

This 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 July 25, 2002.

TRD-200204595
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: September 26, 2002
For further information, please call: (512) 542-6115

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS

The Texas Department of Human Services (DHS) proposes to repeal §3.6001, concerning applicability of temporary assistance to needy families (TANF) policies resulting from Human Resources Code, §31.0031, relating to the personal responsibility agreement, and §3.6002, concerning applicability of temporary assistance for needy families (TANF) policies resulting from Human Resources Code, §31.0065, relating to time-limits; and new §3.6001, concerning applicability of temporary assistance for needy families (TANF) policies resulting

from Human Resources Code, §31.0065, relating to time-limits, in its Texas Works chapter. The purpose of the repeals and new section is to establish hardship exemptions from the five-year time-limit and to reinforce the core program values of work and personal responsibility. Time-limited benefits are a foundation of the TANF program. Some exemptions to this policy are appropriate in true hardship situations, and these exemptions will allow sufficient flexibility so that families facing hardship situations have a safety net. A TANF caretaker can apply for extended TANF at any time after the exhaustion of the five-year limit. DHS proposes the following hardship exemptions from the federal time-limit for clients who: (1) have a personal mental or physical disability expected to last more than 180 days. Initial proof of disability requires a doctor's statement that is no more than six months old. These individuals must have filed an application for Supplemental Security Income (SSI); (2) care for a disabled family member if the disability is expected to last more than 180 days. Verification for initial eligibility is the same as for a personal disability. The disabled member must have filed an application for SSI or be receiving community care services; (3) are victims of domestic violence. This exemption requires a written recommendation from a family violence specialist; (4) do not have access to Choices services. (the client currently resides in a county that does not have full Choices services or resided in a county without full services during the last 12 months of the 60- month time-limit.) This exemption is limited to 24 cumulative months of extended TANF (good cause months and work exemption status would not count towards the cumulative time-limit); and (5) have complied with all Choices requirements, with no more than one non-compliance, but are unable to obtain employment by the end of 60-month time-limit. This exemption is also limited to 24 cumulative months. All hardship exemptions are reviewed every six months. Permanent denial of extended TANF benefits would occur upon the first violation, without good cause, of work or child support requirements. DHS is also changing the title of Subchapter PP to "Applicability of Policies Resulting from the Personal Responsibility Agreement and Time- Limits."

James R. Hine, Commissioner, has determined that, for the first five-year period the proposed sections will be in effect, there will be fiscal implications for state government as a result of enforcing or administering the sections. There will be no fiscal implications for local government as a result of enforcing or administering the sections.

The effect on state government for the first five-year period the sections will be in effect is an estimated additional cost of $9,540 in fiscal year (FY) 2002; $0 in FY 2003; $0 in FY 2004; $0 in FY 2005; and $0 in FY 2006.

Mr. Hine also has determined that, for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to reinforce the core program values of work and personal responsibility. Time-limited benefits are a foundation of the TANF program. Some exemptions to this policy are appropriate in true hardship situations, and the proposed exemptions will allow sufficient flexibility to provide a safety net for families facing hardship situations. The goals of hardship exemptions for the extended TANF program match those of the regular TANF program: work, personal responsibility, and independence from public assistance. Participation in extended TANF should be conditioned on compliance with program requirements related to work and child support designed to help the family achieve independence from public assistance.

There will be no effect on small or micro businesses as a result of enforcing or administering the sections, because the proposed rule concerning federal TANF time-limit rules does not affect the operation of businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There is no anticipated effect on local employment in geographic areas affected by this these sections.

Questions about the content of this proposal may be directed to Eric McDaniel at (512) 438- 2909 in DHS's Texas Works section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-291, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER PP. APPLICABILITY OF POLICIES RESULTING FROM HOUSE BILL 1863

40 TAC §3.6001, §3.6002

(Editor's note: The text of the following section proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Human 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, Chapter 31, which authorizes DHS to administer financial assistance programs.

The repeals implement the Human Resources Code, §31.001-31.053.

§3.6001. Applicability of Temporary Assistance to Needy Families (TANF) Policies Resulting from Human Resources Code, §31.0031, Relating to the Personal Responsibility Agreement.

§3.6002. Applicability of Temporary Assistance for Needy Families (TANF) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-Limits.

This 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 July 29, 2002.

TRD-200204734
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 438-3108

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SUBCHAPTER PP. APPLICABILITY OF POLICIES RESULTING FROM THE PERSONAL RESPONSIBILITY AGREEMENT AND TIME-LIMITS

40 TAC §3.6001

The new section is proposed under the Human Resources Code, Chapter 31, which authorizes DHS to administer financial assistance programs.

The new section implements the Human Resources Code, §31.001-31.053.

§3.6001. Applicability of Temporary Assistance for Needy Families (TANF) Policies Resulting from Human Resources Code, §31.0065, Relating to Time-limits.

(a) The state time-limitation policies specified in the Human Resources Code, §31.0065, apply to all TANF cash assistance cases, including TANF State Program cases, in areas designated by the Texas Department of Human Services (DHS).

(b) Once state time-limits are exhausted, the caretakers and second parents are not eligible to receive TANF cash benefits for five years, unless they have complied with employment services requirements during their time-limited months and meet one of the following hardship criteria:

(1) Severe personal hardship is met if the client:

(A) has a terminal or permanently disabling illness or injury,

(B) is incapacitated by illness or injury for a temporary period, or

(C) is needed in the home for more than 30 days to provide care for a close family member, in or out of the household, who has a temporarily or permanently disabling illness or injury, or terminal illness.

(2) Local economic hardship is met if the client:

(A) lives in a county that is classified by DHS as economically depressed for purposes of TANF time-limits. DHS determines a county is economically depressed if the county's unemployment rate exceeds 10%; or

(B) has done an independent job search, contacting at least 40 employers within a 30-day period, and cannot find employment that replaces the sum of the individual's grant amount and the applicable work expense disregard. While exempt for employment hardship, the client must contact at least 40 employers during each month of the exemption period, unless good cause exists, or no subsequent employment hardship exemption is allowed during the client's five-year freeze-out period.

(3) Severe personal hardship must be requested within 90 days after the illness or injury begins or the client is needed in the home to care for a close family member.

(4) County hardship may be requested at any time during the client's five-year freeze-out period.

(5) Employment hardship must be requested within 90 days after exhausting the TANF time- limit, loss of a job, or the reduction of the number of work hours.

(c) A person disqualified after exhausting his TANF time-limits as detailed in subsection (b) of this section may reestablish eligibility by:

(1) making application before the five-year period of ineligibility has expired and providing verification that he meets the criteria for severe personal hardship or local economic hardship; or

(2) making application after five complete years of disqualification or nonparticipation in the TANF program, except for participation detailed in paragraph (1) of this subsection.

(d) The federal time-limit policies specified in 45 Code of Federal Regulations, §264.1, apply to all TANF and TANF-SP families containing a caretaker or second parent.

(1) No member of a family containing a TANF/TANF-SP caretaker or second parent who has reached his 60-month time-limit for receipt of benefits is eligible for extended TANF/TANF-SP benefits unless the caretaker or second parent:

(A) has no more than 12 months of sanction status for Choices and/or child support noncompliance during the first 60 months of TANF receipt, and

(B) meets one or more of the following hardship criteria:

(i) has a personal mental or physical disability expected to last more than 180 days;

(ii) is responsible for caring for a disabled family member, provided the disability is expected to last more than 180 days;

(iii) is a victim of domestic violence;

(iv) resides in a county that does not have full Choices services;

(v) resided in a county without full Choices services during the last 12 months of the 60-month federal time-limit; or

(vi) was unable to obtain employment by the end of the 60-month time-limit and has no more than one noncompliance with Choices requirements during his 60-month time-limit period.

(2) Eligibility for benefits under subparagraphs (B)(iv), (v), and (vi) of this subsection is limited to 24 cumulative months. Months in which the individual was exempt from or had good cause for not participating in Choices count toward the 24-month limit.

(3) A family receiving benefits detailed in subsection (d)(1) of this section loses its eligibility for extended TANF benefits if the caretaker or second parent fails to comply with Choices or child support requirements without good cause.

(4) Eligibility for benefits detailed in subparagraphs (B)(i) and (ii) of this subsection requires that the disabled family member apply for Supplemental Security Income (SSI) benefits if an application has not already been made. In lieu of SSI application and approval, eligibility for benefits under subparagraph (B)(ii) of this subsection will be extended if the disabled family member is receiving Community Care Services.

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

Filed with the Office of the Secretary of State on July 29, 2002.

TRD-200204737
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 438-3734

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CHAPTER 20. COST DETERMINATION PROCESS

40 TAC §20.110

The Texas Department of Human Services (DHS) proposes to amend §20.110, concerning informal reviews and formal appeals, in its Cost Determination Process chapter. The purpose of the amendment is to remove some references to DHS and to replace others with references to DHS or its designee, since the Texas Health and Human Services Commission (HHSC) performs rate analysis functions for DHS. The amendment also lengthens from 20 to 30 calendar days the time frame in which an interested party must submit a request for an informal review, specifies the deadline for receipt of informal review requests, and stipulates that the request for an informal review must be signed by an individual legally responsible for the conduct of the interested party. The deadline by which additional information must be received, if HHSC Rate Analysis staff request additional information, is clarified to take into account weekend days, state holidays, and national holidays. Additionally, the amendment specifies the deadline by which the DHS Hearings Department must receive a request for a formal appeal; corrects rule citations regarding formal appeals in §20.110(a)(1) and (d); and notes that if an informal review request is rejected for failure to meet the due date and signatory requirements, then the interested party cannot make a formal appeal.

HHSC is proposing related policy in its Chapter 355 in this issue of the *Texas Register*.

James R. Hine, Commissioner, 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.

Mr. Hine 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 better provider compliance with the informal review and administrative appeal processes regarding cost reports and enhancement/accountability reports. Since the amendment seeks to clarify these processes to make the deadlines and other requirements as precise as possible, providers can more easily comply with the rules. There will be no effect on small or micro businesses as a result of enforcing or administering the section, because the amendment simply clarifies for contracted providers the informal review and administrative appeals processes for cost reports and enhancement/accountability reports, without adding any new requirements. There is no anticipated economic cost to persons who are required to comply with the proposed section. There is no anticipated effect on local employment in geographic areas affected by this section.

Questions about the content of this proposal may be directed to Nancy Kimble at (512) 438-4051 in HHSC Rate Analysis for Long Term Care--Aged and Disabled. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-247, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, DHS has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, DHS is not required to complete a takings impact assessment regarding these rules.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes DHS to administer public and medical assistance programs, and under Texas Government Code, §531.021, which provides HHSC with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001 - 22.036 and §§32.001 - 32.052.

§20.110. Informal Reviews and Formal Appeals.

(a) General provisions.

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

(A) Formal appeal--An administrative hearing requested by an interested party under subsection (d) of this section and conducted in accordance with procedures described at §§79.1601 - 79.1610 [~~79.1614~~] of this title (relating to Formal Appeals);

(B) Informal review--The informal reexamination of an action or determination by the Texas Department of Human Services (DHS) or its designee under this chapter requested by an interested party and conducted in accordance with subsection (c) of this section.

(C) (No change.)

(2) (No change.)

(3) Subject matter of informal reviews and formal appeals. An interested party may request an informal review or formal appeal regarding an [~~a DHS~~] action or determination under §20.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §20.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §20.104 of this title (relating to Revenues), and §20.105 of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures), or program-specific allowable or unallowable costs, taken specifically in regard to the interested party.

(b) Separation of informal reviews and formal appeals from the reimbursement determination process.

(1) (No change.)

(2) Closure of cost report databases used in the reimbursement determination process and application of results of pending review or appeal. To facilitate the timely and efficient calculation of reimbursement amounts, DHS or its designee closes cost report databases used in the reimbursement determination process prior to the proposal of reimbursement amounts.

(A) - (C) (No change.)

(c) Informal review.

(1) An interested party who disputes an [~~a DHS~~] action or determination under this chapter may request an informal review under this section. The purpose of an informal review is to provide for the informal and efficient resolution of the matters in dispute. An informal review is not a formal administrative hearing, but is a prerequisite to obtaining a formal administrative hearing and is conducted according to the following procedures:

(A) HHSC Rate Analysis must receive a written request for an informal review by hand delivery, [~~The interested party must contact the Rate Analysis Department in writing by~~] U.S. mail, or special mail delivery no later than 30 [~~within 20~~] calendar days from [~~of~~] the date on the [~~DHS's~~] written notification of the [~~exclusions or~~] adjustments [~~to request an informal review~~]. If the 30th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 30th calendar day is the final day the receipt of the written request will be accepted. A request for an informal review that is not received by the stated deadline will not be accepted.

(B) (No change.)

(C) The written request must be signed by an individual legally responsible for the conduct of the interested party, such as the sole proprietor, a partner, a corporate officer, an association officer, a governmental official, a limited liability company member, a person authorized by the applicable DHS Form 2031 for the interested party on file at the time of the request, or a legal representative for the interested party. The administrator or director of the facility or program is not authorized to sign the request unless the administrator or director holds one of these positions. A request for an informal review that is not signed by an individual legally responsible for the conduct of the interested party will not be accepted.

(2) On receipt of a request for informal review:[~~, the commissioner or his designee assigns the review to appropriate DHS staff.~~]

(A) The lead staff member coordinates the [~~a~~] review [~~by appropriate DHS staff~~] of the information submitted by the interested party. Staff may request additional information from the interested party, which must be received in writing by the lead staff member no later than [~~within~~] 14 calendar days from the date [~~of~~] the interested party receives the written request for additional information. If the 14th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 14th calendar day is the final day the receipt of the additional information will be accepted. Information received after 14 calendar days may not be used in the panel's written decision unless the interested party receives written approval of the lead [~~DHS~~] staff member to submit the information after 14 calendar days.

(B) Within 30 calendar days of the date a written [~~the~~] request for informal review that complies with paragraphs (1) and (2) of this subsection is received [~~by DHS~~] or the date additional requested information is due or received [~~by DHS~~], whichever is sooner, the lead staff member will [~~must~~] send the interested party its written decision by certified mail, return receipt requested. If the 30th calendar day is a weekend day, national holiday, or state holiday, then the first business day following the 30th calendar day is the final day by which the written decision must be sent.

(d) Administrative hearings. An interested party who disagrees with the results of an informal review conducted under subsection (c) of this section may file a formal appeal of the review. The [~~interested party must file a written request for a formal appeal with the~~] Hearings Department of the [~~,~~] Texas Department of Human Services, Mail Code W-613, P.O. Box 149030, Austin, Texas 78714-9030, must receive the written request for a formal appeal from the interested party within 15 calendar days after receiving the [~~DHS review panel's~~] written decision as specified in subsection (c) of this section. The written request for a formal appeal must state the basis of the appeal of the adverse action and include a legible copy of the written decision from the informal review referenced in subsection (c)(2)(B) of this section. The formal appeal is limited to the issues that were considered in the informal review process. The information from the interested party is limited to the pertinent information considered in the informal review process. Formal [~~DHS conducts formal~~] appeals are conducted in accordance with the provisions of §§79.1601 - 79.1610 [~~79.1614~~] of this title [~~(relating to Formal Appeals)~~]. If there is a conflict between the applicable section of Chapter 79 of this title (relating to Legal Services) and the provisions of this chapter, the provisions of this chapter prevail.

(e) Because the formal appeal is limited to issues considered in the informal review process, an informal review request that does not comply with subsections (c)(1)(A), (c)(1)(C), and (c)(2)(A) of this section is not subject to further appeal under §§79.1601 - 79.1610 of this title.

This 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 July 25, 2002.

TRD-200204582
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 438-3734

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PART 2. TEXAS REHABILITATION COMMISSION

CHAPTER 117. SPECIAL RULES AND POLICIES

40 TAC §117.7

The Texas Rehabilitation Commission (TRC) proposes to amend §117.7 of Title 40, Chapter 117, Texas Administrative Code, concerning use of criminal history record information. The change is being proposed to update the standard being applied by TRC when making employment-related determinations pursuant to Human Resources Code section 111.0581.

Bill Wheeler, Deputy Commissioner for Financial Services, has determined that for the first five-year period the section is in effect, there will be no material fiscal implications for state or local government.

Mr. Wheeler also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the agency's compliance with Chapter 111, Human Resources Code. There will be no material effect on small businesses. There is no material anticipated economic cost to persons who are required to comply with the section as proposed. In accordance with Government Code section 2001.022, TRC has determined that the proposed rule will not affect a local economy.

Comments on the proposal may be submitted to Roger Darley, Deputy General Counsel, Texas Rehabilitation Commission, 4900 North Lamar Boulevard, Suite 7300, Austin, Texas 78751.

The amendment is proposed 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.

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

§117.7. Criminal History Record Information.

(a) Pursuant to §111.0581, Human Resources Code, the board establishes the following criteria for denying a person's application for employment based upon criminal history background information obtained pursuant to §411.117, Government Code.

(1) Employment with the Commission will be denied when an applicant's criminal history background information contains either a felony or misdemeanor criminal conviction or deferred adjudication involving moral turpitude which makes the applicant unfit or unsafe to perform the functions of the job.

(2) Criminal history background information other than that described in subsection (a)(1) shall not be disqualifying for employment, but may be considered by the Commission in determining the best qualified candidate for a position.

(b) The commission shall treat all criminal history record information as privileged and confidential and for commission use only.

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

Filed with the Office of the Secretary of State on July 29, 2002.

TRD-200204726
Sylvia F. Hardman
Deputy Commissioner for Legal Services
Texas Rehabilitation Commission
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 424-4050

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PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 364. REQUIREMENTS FOR LICENSURE

40 TAC §364.4

The Texas Board of Occupational Therapy Examiners (TBOTE) proposes amendments to §364.4, concerning Licensure by Endorsement, to be published in the *Texas Register* for public comment. These amendments will recognize US military for licensure requirements, add a category for provisional licensure and specify its duration.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be clarification of terms used in the OT rules. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas, 78701, (512) 305-6900, augusta.gelfand@mail.capnet.state.tx.us.

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§364.4. Licensure by Endorsement.

(a) The board may issue a license by endorsement to applicants currently licensed in another state, District of Columbia or territory of the United States which has licensing requirements substantially equivalent this state. Previous Texas licensees are not eligible for License by Endorsement. An Applicant seeking endorsement must:

(1) meet all provisions for §364.1 of this title (relating to Requirements for License);

(2) arrange to have NBCOT's Verification of Certification form sent directly to the board;

(3) submit verification of license in good standing from the state(s) in which the applicant is currently licensed. This must be an original verification sent directly by the licensing board in that state, or,

(4) submit, if applying from a non-licensing state or US military and not holding a current state license, [~~submit~~] a Verification of Employment form substantiating occupational therapy employment for at least 2 years immediately preceding application for a Texas license [~~showing the two most recent years of employment~~].

(b) Provisional License:

(1) The Board may grant a Provisional License [~~prior~~] to an applicant who is applying for License by endorsement if there is an unwarranted delay in the submission of required documentation outside the applicant's control. All other requirements for licensure by endorsement must be met. The applicant must also submit the Provisional License fee as set by the Executive Council. The Board may not grant a provisional license to an applicant with disciplinary action in their license history, or to an applicant with pending disciplinary action. The Provisional License will have a duration of 180 days.

(2) The Board may grant a Provisional License to an applicant who has previously held a Texas license and does not meet the requirements for restoration of a license as outlined in Chapter 370 provided that such applicant has a current license in good standing in another state which has licensing requirements substantially equivalent to Texas. Upon receiving a passing score from NBCOT, a new regular license will be issued, as outlined in §364.2 of this chapter. A failing score will result in revocation of the Provisional License. The Provisional License will have a duration of 180 days. The applicant must:

(A) submit a new application as outlined in §364.1 and §364.2 of this title;

(B) submit verification of the current license in another state or US territory;

(C) submit the provisional license fee as set by the Executive Council;

(D) submit a copy of the confirmation of registration for NBCOT's national examination.

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

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

TRD-200204577
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 305-6900

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PART 19. TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES

CHAPTER 700. CHILD PROTECTIVE SERVICES
SUBCHAPTER K. COURT-RELATED SERVICES

40 TAC §700.1109

The Texas Department of Protective and Regulatory Services (PRS) proposes an amendment to §700.1109, concerning enforcement of child support orders, in its Child Protective Services Chapter. The purpose of the amendment is to update and clarify the section by specifying that child support will be sought in all foster care cases. The amendment also deletes requirements that are contained in §700.1108, Request for Child Support Orders, updates current eligibility terms, and properly identifies the state agency and division responsible for child support enforcement.

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 child support enforcement will be operated in an effective and efficient manner. There will be no effect on large, small, or micro-businesses because the section does not impose new requirements on any business. 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 Martha Sandoval Bustamanate at (512) 438-5257 in PRS's Child Protective Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-221, 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 §40.029, which authorizes the department to propose and adopt rules in compliance with state law and to implement department programs.

The amendment implements the Human Resources Code, §40.029.

§700.1109. Enforcement of Child Support Orders.

[(a) A child's parents have a right to be notified and a right to be represented by an attorney when the Texas Department of Protective and Regulatory Services (PRS) pursues enforcement of child support orders on the child's behalf. The worker must inform the parents of these rights.]

(a) [(b)] PRS requests enforcement of court-ordered child support through the Texas Office of the Attorney General (OAG) Child Support Division [attorney general's child support enforcement program].

(b) [(c)] After determining eligibility, PRS must refer all Title IV-E (Type Program 08), State-Paid (Type Program 10), and Medical Assistance Only (MAO) (Type Program 09) eligible children to the OAG's Child Support Division when child support is court-ordered [aid to families with dependent children (AFDC) foster care cases to the Texas attorney general's child- support enforcement program after determining eligibility unless:]

[(1) parental rights are terminated;]

[(2) the parent is incapacitated or deceased; or]

[(3) PRS determines that pursuit of child support is not in the best interest of the child].

(c) [(d)] The [Both] legal parents of a child in [AFDC] foster care must be included in a referral for enforcement of child support orders [unless one of the exemptions in subsection (c) of this section applies]. Each legal parent is included even if one or both are missing or living in another state. If a parent has more than one child in [AFDC] foster care, the parent must be included in each child's referral.

(d) [(e)] As the child's managing conservator, PRS may ask the OAG's Child Support Division [state attorney general] to defer collection of child support for up to six months when deferment is in the best interest of the 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 July 26, 2002.

TRD-200204700
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 27, 2002
For further information, please call: (512) 438-3437

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CHAPTER 702. GENERAL ADMINISTRATION
SUBCHAPTER M. VEHICLE FLEET MANAGEMENT

40 TAC §702.1201, §702.1203

The Texas Department of Protective and Regulatory Services (PRS) proposes new Subchapter M, Vehicle Fleet Management, consisting of §702.1201 and §702.1203, in its General Administration chapter. The purpose of the new sections is to establish policies and procedures, as required by state law, concerning the use and assignment of agency-owned vehicles. The sections are consistent with the Vehicle Fleet Management Plan adopted by the Office of Vehicle Fleet Management of the Texas Building and Procurement Commission.

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 PRS will have adopted agency rules concerning management of its vehicles, as required by state law. There will be no effect on large, small, or micro-businesses because these rules do not impose any new requirements on 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 Art Riojas at (512) 832-2040 in PRS's Business Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-225, 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, §40.029, which authorizes PRS to propose and adopt rules to facilitate implementation of department programs, and the Government Code, §2171.1045, which requires each state agency to adopt rules relating to the assignment and use of the agency's vehicles.

The new sections implement the Government Code, §2171.1045.

§702.1201. What is the purpose of this subchapter?

The rules in this subchapter govern the agency's assignment and use of agency-owned vehicles.

§702.1203. What policies and procedures govern the assignment and use of agency-owned vehicles?

(a) The PRS Business Services division is responsible for the development and implementation of agency policies and procedures, which must be consistent with the State Vehicle Fleet Management Plan adopted by the Office of Vehicle Fleet Management of the Building and Procurement Commission, as well as all other applicable state and federal laws.

(b) It is the policy of PRS that each agency vehicle will be assigned to the agency motor pool and be available for checkout, except as otherwise provided in this section.

(c) An agency-owned vehicle may be assigned to an individual employee on a regular or everyday basis only if the agency makes a written finding that the assignment is critical to the needs and mission of the agency.

This 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 July 26, 2002.

TRD-200204704
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 27, 2002
For further information, please call: (512) 438-3437

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CHAPTER 720. 24-HOUR CARE LICENSING
SUBCHAPTER A. STANDARDS FOR CHILD-PLACING AGENCIES

40 TAC §720.29

The Texas Department of Protective and Regulatory Services (PRS) proposes an amendment to §720.29, concerning children's rights, in its 24-Hour Care Licensing chapter. The purpose of the amendment is to remove language that conflicts with federal law. The current rule requires child-placing agencies to ensure that a child's cultural needs are considered when being placed in foster or adoptive placements. In most cases, this consideration would be prohibited by the Multi-Ethnic Placement Act of 1994 (MEPA) and the Removal of Barriers to Interethnic Adoption Provisions of 1996 (IEP). Generally, 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 family; and from considering the capacity of the prospective foster or adoptive parents to meet the needs of a child relating to race, color, or national origin. The proposed amendment removes this requirement.

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 be in compliance with federal law. 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. 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 Betty Finley at (512) 438-3234 in PRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-215, 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 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 provisions of the statute and to regulate child care operations.

The amendment implements the Multi-Ethnic Placement Act of 1994 (MEPA), as amended (42 USC 622) and the Removal of Barriers to Interethnic Adoption Provisions of 1996 (IEP).

§720.29. Children's Rights.

(a) General rights. The child-placing agency must ensure that

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

(3) children are placed and supervised appropriately in the least restrictive environment capable of meeting their needs. The placement must meet the child's physical and emotional needs, and must provide consideration for sibling relationships [~~and cultural needs~~].

(4)-(5) (No change.)

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

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204699
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: November 22, 2002
For further information, please call: (512) 438-3437

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CHAPTER 745. LICENSING

The Texas Department of Protective and Regulatory Services (PRS) proposes amendments to §§745.37, 745.129 and 745.143; proposes the repeal of §745.141; and proposes new §745.141, concerning what specific types of programs does Licensing regulate, what miscellaneous programs are exempt from Licensing regulation, in what circumstances may I apply for a permit even though my program is exempt, if my program is exempt and does not need regulation for funding purposes, can I still obtain a permit from Licensing, and can Licensing regulate my program even if it qualifies for an exemption in its Licensing chapter. The proposed change allows neighborhood recreation programs to serve children, ages 5 through 13 years in lieu of the current age range, eight through 13 years. The sections are being amended to more closely mirror the criteria in Chapter 42 of the Human Resources Code, §42.041(b)(14) for a municipal recreational program that is exempt. The proposed changes in §745.129(1), provide exemption for a neighborhood recreation program that comply with national minimum standards that include staffing ratios, staff training, and health and safety requirements; add requirements for parents to sign statements saying their children may come and go at will from the program; delete references to enrollment information; and change age limits on children served. Proposed changes to §745.141 and §745.143 add that an exempt program may apply to be licensed in order for the program to receive public funding. In addition, updates to §745.37(2)(F) and (H) have been made so that the administrative rules in Chapter 745, Licensing, match the minimum standard rules in Chapter 720, 24-Hour Care Licensing.

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 exemption rules will be more consistent, and PRS will be able to concentrate public resources on those programs subject to regulation. There will be no effect on large, small, or micro-businesses because these rules 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 Beverly Duffee at (512) 438-2092 in PRS's Licensing Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-222, 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 B. CHILD CARE AND OTHER OPERATIONS THAT WE REGULATE

40 TAC §745.37

The amendment is proposed under the Human Resources Code, §40.029, which authorizes PRS to propose and adopt rules to facilitate implementation of department programs, and the Human Resources Code, §40.002, which gives the department primary responsibility for regulating child-care facilities.

The amendment implements the Human Resources Code, §40.029 and §40.002.

§745.37. What specific types of operations does Licensing regulate?

The charts in paragraphs (1) and (2) of this section list the types of operations for child day care and residential child care that we regulate. Maternity homes and child-placing agencies are included in the residential child-care chart. The chart in paragraph (3) of this section lists the operations verified by a child-placing agency.

(1) (No change.)

(2) Types of Residential Child-Care Operations.

Figure: 40 TAC §745.37

(3) (No change.)

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

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204701
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 27, 2002
For further information, please call: (512) 438-3437

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SUBCHAPTER C. OPERATIONS THAT ARE EXEMPT FROM REGULATION
DIVISION 2. EXEMPTIONS FROM REGULATION

40 TAC §§745.129, 745.141, 745.143

The amendments and new section are proposed under the Human Resources Code, §40.029, which authorizes PRS to propose and adopt rules to facilitate implementation of department programs, and the Human Resources Code, §40.002, which gives the department primary responsibility for regulating child-care facilities.

The amendments and new section implement the Human Resources Code, §40.029 and §40.002.

§745.129. What miscellaneous programs are exempt from Licensing regulation?

The following miscellaneous programs are exempt from our regulation: Figure: 40 TAC §745.129

§745.141. In what circumstances may I apply for a permit even though my program is exempt?

You may apply for a permit if you must have one for your program to receive public funding. If we issue you a permit, then you must comply with all statutes, rules, and minimum standards that apply to that permit.

§745.143. If my program is exempt and does not need regulation for funding purposes [I do not receive state or federal funds], can I still obtain a permit from Licensing?

No, if your program is exempt and we do not regulate it under §745.141 of this title (relating to In what circumstances may I apply for a permit even though my program is exempt), [is not receiving state or federal funds that may require regulation,] we will not issue you a permit.

This 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 July 26, 2002.

TRD-200204702
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 27, 2002
For further information, please call: (512) 438-3437

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40 TAC §745.141

(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, §40.029, which authorizes PRS to propose and adopt rules to facilitate implementation of department programs, and the Human Resources Code, §40.002, which gives the department primary responsibility for regulating child-care facilities.

The repeal implements the Human Resources Code, §40.029 and §40.002.

§745.141. Can Licensing regulate my program even if it qualifies for 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 July 26, 2002.

TRD-200204703
C. Ed Davis
Deputy Director, Legal Services
Texas Department of Protective and Regulatory Services
Proposed date of adoption: September 27, 2002
For further information, please call: (512) 438-3437

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 4. EMPLOYMENT PRACTICES

SUBCHAPTER D. SUBSTANCE ABUSE PROGRAM

The Texas Department of Transportation (department) proposes the repeal of §§4.30-4.40, and simultaneously proposes new §§4.30-4.46, concerning the Substance Abuse Program.

EXPLANATION OF PROPOSED REPEAL AND NEW SECTIONS

The department's substance abuse rules implement the department's Substance Abuse Program. Experience with the program has identified a need to update some standards to prevent the evasion of the intent of the rules.

In addition, the existing rules have proven to be excessively long and difficult to follow. By rearranging the rules, eliminating unnecessary duplication, avoiding the unnecessary repetition of federal requirements, and simplifying the language, it has been possible to reduce the size of the rules by approximately one-half. The revised rules contain, so far as possible, plainer language, shorter sections, fewer definitions, and fewer unnecessary cross-references. The effect should be a set of rules that will be easier for employees, supervisors, and others to understand and implement. Except as noted, the reorganization of the rules is intended to have no substantive effect.

New §4.30 is based on existing §4.30.

New §4.31 is based on existing §4.31. It eliminates about half the definitions in the existing rule as unnecessary. Most of the remaining definitions are closely modeled on the existing rules, with the following exceptions.

New §4.31(3) defines alcohol- or drug-related driving offense. This definition replaces existing §4.31(15), conviction of DUI/DWI. Under the prior standard, it was possible for an employee to avoid administrative or disciplinary action by pleading to a slightly different offense, such as reckless endangerment, instead of driving while intoxicated or driving while under the influence. Indeed, even conviction for a far more serious offense, such as involuntary manslaughter, would not trigger administrative or disciplinary action because it is not technically a conviction for DUI/DWI. The new definition closes this loophole and treats all alcohol- and drug-related driving offenses alike.

New §4.31(7) adds a definition of critical duties to clarify references to the duties listed in existing §4.32(b)(2)(C).

New §4.31(10) incorporates the existing definition of driving for the department. It adds a new sentence restating the department's current position that an employee is considered to hold a position that involves driving for the department if the position may require driving for the department. This would cover the overwhelming majority of department employees.

New §4.31(12) clarifies that temporary recruitment employees are considered employees for purposes of the Substance Abuse Program.

New §4.31(14) is supplemented by adding that the definition of EAP counselor includes a substance abuse professional within the meaning of the rules of the Office of the Secretary of Transportation at 49 CFR, Part 40.

New §4.31(21) sets standards for defining safety-sensitive activities, but delegates the determination of particular activities to the director of the Human Resources Division. This will provide greater certainty and flexibility than existing §4.36(a), which attempts to provide a detailed list of all job functions that are safety sensitive. The detailed approach has proved cumbersome and inflexible in practice. The general standards are the same as in the existing rules.

New §4.31(23) similarly delegates the determination of safety-sensitive positions to the director of the Human Resources Division. The standard for determining a safety-sensitive position is the same as in the existing rules.

New §4.31(28) defines supervisor to include employees technically classified as managers, supervisors, lead workers, and project leaders. This permits employees with effective supervisory responsibilities to be trained and to make designated substance abuse decisions.

New §4.31(29) defines alcohol and drug use to include being under the influence of alcohol or a drug and to include the use of inhalants. This definition simplifies references throughout the rules by avoiding unnecessary repetition of multiple, related types of conduct.

New §4.31(31) defines workplace as any location at which an employee works. This could include, for example, a construction site or a vehicle in which an employee is driving for the department.

New §4.32 is based on existing §4.32(a)(6)-(8).

New §4.33 is based on existing §4.32(a)(1)-(5) and §4.32(c)(1)(A).

New §4.34 is based on existing §§4.32(a) and (c), 4.34(e), 4.35(d), 4.36(c)(1), and 4.36(d). It brings together a series of related prohibitions relating to the possession or use of illegal drugs and the commission of criminal offenses involving illegal drugs. No substantive change is intended.

New §4.35 is based on existing §§4.32(b), (c), and (d), 4.34(e), 4.35(d), and 4.36(d). It brings together a series of related prohibitions relating to administrative and disciplinary actions that may be taken by the department in response to the use of alcohol or drugs in the workplace.

New §4.35(c) tracks existing §4.32(c)(1)(B)(iii) governing the department's reaction when an employee is reasonably suspected of working under the influence of alcohol or drugs, but there are insufficient observations and documentation to warrant administrative or disciplinary action. Like the existing rule, the new rule provides that the employee will be given an opportunity to explain the facts giving rise to the reasonable suspicion. The new rule, however, eliminates the requirement that this explanation be requested in a specified written form. This change will allow the department greater flexibility in appropriately addressing a wide range of potential behaviors.

New §4.35(g) clarifies that the department will not hire a final applicant if the applicant has engaged in conduct that would justify terminating an employee. The provision avoids unnecessary duplication that would be caused by referencing final applicants in each rule provision prohibiting certain conduct. It also places limits on the hiring or rehiring of employees who are likely to generate substance abuse problems in the future.

New §4.36 is based on existing §4.32(b)(1)-(3). No substantive change is intended.

New §4.37 is based on existing §4.32(c)(1) and (8). No substantive change is intended.

New §4.38 is based on existing §4.37. The procedures governing drug tests have been greatly shortened by cross-referencing the federal standards instead of restating them.

New §4.38(c) is added to require a retest if a urine specimen shows chemical evidence of having been diluted.

New §4.39 is based on existing §§4.32(c)(1)(B)(viii), 4.34(d)(3), 4.35(c)(4), and 4.36(c)(3). It brings together a series of related provisions dealing with refusals by employees to submit to testing.

New §4.39(c) contains an expanded list of conduct that will be considered a refusal to test. New provisions are incorporated in paragraphs (3), (4), (5), (6), and (9). The additions will make it more difficult for someone to avoid proper testing or to obstruct the process.

New §4.40 is based on existing §4.32(c)(1) and (d). No substantive change is intended.

New §4.41 is based on existing §4.32(c)(4). It addresses the voluntary admission of an alcohol or drug problem by an employee.

New §4.41(a) is added to establish the scope of the section.

New §4.41(b)(1) is added to address driving by an employee who has admitted an alcohol or drug problem.

New §4.41(c) is added to meet the requirements of the Federal Motor Carrier Safety Administration set forth in 49 CFR §382.121. It establishes a program to encourage the voluntary admission of alcohol or drug problems by commercial drivers, safety-sensitive employees, and vessel crewmembers.

New §4.42 is based on existing §4.32(c)(9). The new rule clarifies that recurrence of substance abuse includes the prior service of an employee who has been rehired after a break in service.

New §4.43 is based on existing §4.33. No substantive change is intended.

New §4.44 is based on existing §§4.34, 4.35, and 4.36. It brings together a series of related provisions dealing with substance abuse involving commercial drivers, safety-sensitive employees, and vessel crewmembers. Like the existing rule, the new rule provides that the department may waive a pre-employment drug test for an internal transfer if the transferring employee has taken and passed a drug test within the preceding three years. It adds

the requirement that this waiver will only be available if the employee has not been mandatorily referred to the Employee Assistance Program.

New §4.45 is based on existing §4.38 and §4.40. No substantive change is intended.

New §4.46 is based on existing §4.32(e). No substantive change is intended.

Several provisions of the old rules are eliminated as unnecessary. Existing §4.32(c)(6)(D) is removed. This provision required a signed written statement from an employee who admits selling drugs. It is eliminated because the sanction for admitting to selling drugs and for refusing to sign the statement were both termination, and therefore the statement served no purpose. Existing §4.39 is removed. This provision stated that an employee could use the internal grievance process if affected by an adverse personnel action under this subchapter. The internal grievance process is not incorporated in the Texas Transportation Commission's (commission's) rules; rather, it is an informal management appeal established and governed by the department's human resources policy. Therefore, the reference in the substance abuse rules is unnecessary and inappropriate.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five years the repeals and new sections are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals and new sections. There are no anticipated economic costs for persons required to comply with the sections as proposed.

Diana Isabel, Director, Human Resources Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new sections.

PUBLIC BENEFIT

Ms. Isabel has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be to increase understanding of the department's substance abuse policy among employees and members of the public and to protect the public and other employees from the risk posed by an employee who engages in substance abuse. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeals and new sections may be submitted to Diana Isabel, Director, Human Resources Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on September 9, 2002.

43 TAC §§4.30 - 4.40

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

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

No statutes, articles, or codes are affected by the proposed repeals.

§4.30. Purpose.
§4.31. Definitions.
§4.32. All Department Employees.
§4.33. Employees Who Drive For The Department.
§4.34. Commercial Drivers.
§4.35. Crewmembers.
§4.36. Safety Sensitive Employees.
§4.37. Test Procedures.
§4.38. Confidentiality.
§4.39. Appeals.
§4.40. Records and Retention.

This 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 July 26, 2002.

TRD-200204627
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-8630

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43 TAC §§4.30- 4.46

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

No statutes, articles, or codes are affected by the proposed new sections.

§4.30. Purpose.
This subchapter contains the Texas Transportation Commission's substance abuse program. The goal is to achieve an alcohol- and drug-free workplace, which will help protect the health and safety of the public and of the department's most valuable resource, its employees. The department is committed to rehabilitating and restoring employees whose performance may be impaired by alcohol or drug abuse.

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

(1) Alcohol--The intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

(2) Alcohol test result--The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test.

(3) Alcohol- or drug-related driving offense--A conviction or deferred adjudication for any offense involving the driving of a vehicle, whether on-duty or off-duty, while under the influence of alcohol or drugs or while intoxicated.

(4) Commercial driver--An employee who operates a commercial motor vehicle for the department, regardless of the frequency.

(5) Commercial motor vehicle--A motor vehicle or combination of vehicles used to transport passengers or property if it:

(A) has a gross combination weight rating of 26,001 or more pounds inclusive of a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

(B) has a gross vehicle weight rating of 26,001 or more pounds;

(C) is designed to transport 16 or more passengers, including the commercial driver; or

(D) is of any size and is used in the transportation of materials that are considered hazardous under the Hazardous Materials Transportation Act, 49 USC §5103(b), and that require the motor vehicle to be placarded under the Hazardous Materials Regulations, 49 CFR Part 172, Subpart F.

(6) Completion of treatment--Compliance with all EAP treatment recommendations and requirements, passing all required drug and alcohol tests, and finishing all treatment as prescribed by the EAP counselor or by the treatment program's staff physician.

(7) Critical duties--Driving, commercial driving, performing safety-sensitive activities, performing vessel crewmember duties, operating motorized equipment, supervising or assisting with the loading or unloading of a motor vehicle, and inspecting, servicing, or maintaining any vehicle.

(8) Department--The Texas Department of Transportation.

(9) Directly involved--Potentially responsible for a serious accident or a serious marine accident.

(10) Driving for the department--Operating a vehicle, including an automobile, truck, motor-driven equipment, roller, tractor, grader, ferry, or aircraft, during the course and scope of employment, without regard to ownership of the vehicle or the frequency of operation. An employee holds a position that involves driving for the department if the position may require driving for the department.

(11) Drug--A narcotic drug, controlled substance, or marijuana, as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 USC §802, not including a substance legally available by prescription or over the counter.

(12) Employee--A person employed by the department in a full-time, part-time, temporary, project, or seasonal position, including temporary recruitment employees, but not including other temporary employees under contract to the department.

(13) Employee Assistance Program (EAP)--A program designed to assist employees and their immediate family members in dealing with emotional and personal problems, including alcohol and drug abuse, that potentially affect an employee's work performance and safety.

(14) EAP counselors--Licensed medical doctors; licensed doctors of osteopathy; psychologists licensed or certified by the Texas State Board of Examiners of Psychologists or another regulating board; social workers licensed or certified by the Texas State Board of Social Worker Examiners or another regulating board; employee assistance professionals licensed or certified by the Employee Assistance Professionals Association, Inc., or another regulating board; and addiction counselors certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission, by the International Certification and Reciprocity Consortium/Alcohol and Other Drug Abuse, or by another regulating board, with knowledge of and clinical experience in the diagnosis and treatment of alcohol- and drug-related disorders, including Substance Abuse Professionals as defined in 49 CFR, Part 40.

(15) Final applicant--A person who is given a conditional offer of initial employment.

(16) Human Resources Division--An organizational unit in the department's Austin headquarters that oversees human resource functions for the department.

(17) Inhalant--A breathable chemical that produces mind-altering vapors, including volatile solvents, aerosols, nitrites, and anesthetics.

(18) Mandatory referral--A referral to the EAP that requires an employee to report to the EAP and complete treatment or be terminated from employment with the department.

(19) Medical review officer--A licensed physician who is responsible for reviewing laboratory results generated by an employer's drug testing program and evaluating medical explanations for certain drug test results.

(20) Possession of alcohol or drugs--The presence of alcohol or drugs in an area under an employee's effective control.

(21) Safety-sensitive activity--Any activity, as determined by the director of the Human Resources Division, that:

(A) could present a threat to the health or safety of employees or the public if performed with inattentiveness, errors in judgment, diminished coordination, reduced dexterity, or lack of composure; and

(B) is performed with such independence that it cannot reasonably be assumed that mistakes could be prevented by a supervisor or another employee.

(22) Safety-sensitive employee--An employee who holds a safety-sensitive position.

(23) Safety-sensitive position--A full-time, part-time, temporary, project, or seasonal position, as determined by the director of the Human Resources Division, that requires the performance of one or more safety-sensitive activities at least four times in twelve consecutive months.

(24) Serious accident--Any accident involving a commercial motor vehicle or that occurs on a day in which the employee has performed or will perform a safety-sensitive activity and resulting in:

(A) injury to an employee who is directly involved in the accident, who requires professional medical treatment beyond first aid, and who does not return to work on the day following the injury or who returns to work to perform restricted duties;

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to a vehicle that causes it to be inoperable; or

(D) receipt of a citation under state or local law for a moving traffic violation in connection with the accident.

(25) Serious marine accident--Any reportable marine accident resulting in:

(A) injury to an employee who is directly involved in the accident, who requires professional medical treatment beyond first aid, and who does not return to work or who returns to work to perform restricted duties;

(B) death or injury to another person who requires professional medical treatment beyond first aid;

(C) damage to property in excess of $100,000;

(D) actual or constructive total loss of any ferry subject to Coast Guard inspection under 46 USC §3301 or to any ferry of 100 gross tons or more if not subject to Coast Guard inspection;

(E) a discharge of 10,000 or more gallons of oil into navigable waters of the United States; or

(F) a discharge of a reportable quantity of a hazardous substance into the environment or into the navigable waters of the United States.

(26) Substance control officer--An employee who administers the substance abuse program.

(27) Treatment--Medical or psychological therapy or education for alcohol or drug dependency, whether conducted on an inpatient basis, on an intensive outpatient basis, or as educational or counseling sessions. Treatment includes any aftercare following inpatient treatment or intensive outpatient treatment, including weekly counseling sessions as designated by the EAP counselors.

(28) Supervisor--Any employee who has formal supervisory or managerial responsibilities, who is designated to coordinate the work activities of other employees, or who is designated to direct a team of employees.

(29) Use of alcohol or a drug--The ingestion by any means of any substance containing alcohol, including medication; the use in any way of a drug; or being under the influence of alcohol, an inhalant, or a drug. Drug use and drug abuse include the use of an inhalant in a manner other than that for which it was intended and that causes or is known to cause intoxication.

(30) Vessel Crewmember--An individual who:

(A) is working on board a vessel, whether or not as a member of the vessel's crew;

(B) occupies or performs the functions of a position required by the vessel's Certificate of Inspection;

(C) performs the duties of a patrolman or watchman; or

(D) is assigned during an emergency to warn passengers or control the movement of passengers on a vessel.

(31) Workplace--Any location where an employee works, whether or not on state-owned property. An employee is in the workplace when operating or riding in a state vehicle.

§4.32. Department Actions Relating to Substance Abuse.

(a) Administrative and disciplinary actions. An employee who violates the policies and prohibitions of this subchapter will be subject to discipline, up to and including termination from the department.

(b) Mandatory referral. In addition to or instead of disciplinary action, an employee may be mandatorily referred to the EAP and required to complete treatment.

(c) Voluntary referral. The department provides the EAP and encourages employees to use its services voluntarily to deal with alcohol or drug abuse before job performance is affected. Completion of treatment may mitigate the need for discipline.

(d) Acknowledgement of policy. As a condition of employment, each employee must comply with this subchapter and must sign a form acknowledging these standards of conduct.

§4.33. Prohibited Conduct.

(a) Employee obligation. Department employees have an obligation to uphold the public's trust in the department by projecting a positive image to other employees and the public at all times.

(b) Alcohol and drug use. An employee is prohibited from using alcohol or drugs, possessing an open container of an alcoholic beverage, or possessing a drug in the workplace.

(c) Sale of drugs. An employee is prohibited from the illegal sale, distribution, transportation, or manufacture of drugs, whether in the workplace or outside the workplace. This prohibition includes any violation of state and federal controlled substances acts.

(d) Lawful medication. An employee is prohibited from reporting to work, working, or operating a state vehicle while under the influence of lawfully prescribed or over-the-counter substances if the employee's performance is impaired. An employee may appropriately use prescribed or over-the-counter medications if work performance is not impaired.

(e) Responsibilities of supervisors. A supervisor may not allow an employee to continue to work if the supervisor has actual knowledge that the employee in the workplace is using alcohol or drugs in the workplace, possesses an open container of an alcoholic beverage in the workplace, or possesses a drug in the workplace.

§4.34. Illegal Drugs.

(a) Distribution. An employee will be terminated from the department if convicted of a criminal drug violation relating to the sale, distribution, transportation, or manufacture of drugs, whether in the workplace or outside the workplace. A final applicant will not be hired if the final applicant is on probation or parole for a felony conviction related to the sale, distribution, transportation, or manufacture of drugs or the possession with the intent to sell, distribute, transport, or manufacture drugs. An employee will be terminated from the department if it is determined that at the time of hire, the employee was on probation or parole for a felony conviction related to the sale, distribution, transportation, or manufacture of drugs or the possession with the intent to sell, distribute, transport, or manufacture drugs.

(b) Suspicious substance. The following procedure will be followed if a substance appearing to be a drug is found in the possession of an employee in the workplace. It will also be followed if an employee is reasonably suspected of selling, distributing, transporting, or manufacturing drugs, whether in the workplace or outside the workplace. Reasonable suspicion may be based on any circumstance, including direct observation in the workplace or an arrest, charge, or indictment for selling, distributing, transporting, or manufacturing drugs.

(1) The employee's supervisor will immediately place the employee on administrative leave pending investigation by the department.

(2) The employee will immediately be provided with a letter that:

(A) summarizes the facts on which reasonable suspicion is based;

(B) notifies the employee that selling, distributing, transporting, or manufacturing drugs subjects the employee to termination from the department;

(C) advises that the employee will have a specified time in which to provide a reasonable explanation to the employee's supervisor or substance control officer; and

(D) advises that the employee may be terminated from the department if the employee refuses to offer a reasonable explanation, if the response indicates that the employee sold, distributed, transported, or manufactured drugs, or if the response is insufficient or unacceptable.

(3) An employee who is suspected of selling, distributing, transporting, or manufacturing drugs will be terminated from the department if:

(A) the employee fails to respond within the specified time or to provide a sufficient and acceptable explanation;

(B) the substance control officer confirms the illegal acts; or

(C) investigation by law enforcement or other governmental authorities confirms the illegal acts.

(4) An employee who used or possessed drugs in the workplace, but did not sell, distribute, transport, or manufacture drugs, will be mandatorily referred to the EAP and required to complete treatment if:

(A) the employee fails to respond within the specified time or to provide a sufficient and acceptable explanation;

(B) the substance control officer confirms the illegal acts; or

(C) investigation by law enforcement or other governmental authorities confirms the illegal acts.

(5) An employee will be made aware of the EAP if it is determined that the employee used drugs outside the workplace and did not use drugs in the workplace or sell, distribute, transport, or manufacture drugs.

(6) If an employee is reasonably suspected of selling, distributing, transporting, or manufacturing drugs, the substance control officer shall contact the Office of General Counsel or the substance abuse program staff of the Human Resources Division immediately, before turning the matter over to law enforcement authorities.

(c) Notifications.

(1) An employee shall notify the employee's supervisor in writing if the employee is arrested, charged, or indicted for selling, distributing, transporting, or manufacturing drugs, whether in the workplace or outside the workplace. If the employee fails to make this notification within one day after returning to work following the occurrence, the employee will be suspended five days without pay. The five-day suspension will occur during a single work week if the employee is an FLSA-exempt employee.

(2) An employee shall notify the employee's supervisor in writing if the employee is convicted for selling, distributing, transporting, or manufacturing drugs, whether in the workplace or outside the workplace. If the employee fails to make this notification within one day after returning to work following the occurrence, the employee will be terminated from the department whenever it is discovered.

(3) An employee shall notify the employee's supervisor in writing if the employee is convicted of any violation of any criminal drug statute based on the employee's conduct in the workplace. This notification must occur within one work day after the employee returns to work following the conviction if the violation is related to conduct that occurred in the workplace. If the employee fails to make this notification on time, the department will suspend the employee within 30 days after it discovers the conviction. The suspension will be for five days without pay and will occur during a single work week if the employee is an FLSA-exempt employee. Under the Drug Free Workplace Act 1988, 41 USC §§701-707, the department will notify the appropriate federal agency of the conviction within 10 days after receipt of the notice.

§4.35. Administrative Actions.

(a) Removal from critical duties. A supervisor or substance control officer will immediately remove an employee from critical duties if the employee is suspected of violating this subchapter.

(b) Sufficient documentation. An employee will be tested for cause if a supervisor has a reasonable suspicion that the employee was working under the influence of alcohol or drugs. This determination must be based on observed and documented physical, behavioral, or performance indications.

(c) Insufficient documentation. An employee will be given an opportunity to offer an explanation if a supervisor has a reasonable suspicion that the employee was working under the influence of alcohol or drugs, but does not have sufficient observed and documented indications to justify testing for cause.

(d) Sufficient response. If an employee provides a sufficient and acceptable response under subsection (c) of this section, the employee will remain subject to administrative and disciplinary actions if it is later discovered that the employee has worked under the influence of alcohol or drugs. The supervisor or substance control officer will so advise the employee.

(e) Procedural response.

(1) The department will follow the procedures established in paragraph (2) of this subsection under either of the following circumstances.

(A) A supervisor has a reasonable suspicion under subsection (b) of this section that an employee was working under the influence of alcohol or drugs.

(B) An employee refuses to offer an explanation under subsection (c) of this section, the response indicates that the employee violated this subchapter, or the response is insufficient or unacceptable.

(2) Under any of the circumstances listed in paragraph (1) of this subsection, the department will follow the following procedures.

(A) The supervisor or the substance control officer will mandatorily refer the employee to the EAP and require the employee to complete treatment.

(B) The department may take disciplinary action.

(C) For 24 hours the employee will be prohibited from working and will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(f) Lawful medications. When an employee is unable to work in a safe and effective manner because of the use of lawfully prescribed or over-the-counter substances, the employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(g) Final applicants. The department will not hire a final applicant if the applicant has engaged in conduct that would justify terminating an employee from the department.

§4.36. Testing.

(a) Notification to employees. An employee will be notified in writing that the employee is subject to drug and alcohol testing before being required to submit to an alcohol or drug test.

(b) Pre-employment testing.

(1) A final applicant must pass a drug test before being hired for any position that involves driving for the department.

(2) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests those results in writing within 60 calendar days after being notified of the disposition of the employment application. The department will also inform the applicant which drugs, if any, were verified as positive.

(c) Testing for cause. Any employee who is reasonably suspected of using alcohol or drugs in the workplace will be required to undergo an alcohol or drug test.

(1) The decision to test must be based on the reasonable belief of a supervisor who has been trained on the signs and symptoms of alcohol and drug use. The decision must be based on specific, contemporaneous, articulable observations concerning appearance, behavior, speech, body odor, performance, or other indications of probable use. These observations may include indications of chronic use and withdrawal symptoms.

(2) When a supervisor reasonably suspects an employee of using alcohol or drugs in the workplace, the supervisor will contact the substance control officer immediately. The supervisor will make an immediate inquiry into all relevant surrounding circumstances and may confer with the employee. The substance control officer will document whether testing is justified based on the supervisor's observations and the substance control officer's independent analysis. Within 24 hours the supervisor or substance control officer will submit that person's observations in writing to the substance abuse program staff in the Human Resources Division.

(3) Testing for cause must be approved by the director of the Human Resources Division or designee and by the relevant district engineer, division director, office director, or designee not below the level of deputy district engineer, deputy division director, deputy office director, director of administration, or division administrative manager.

(4) Pending a decision to test or if testing is not available, the employee will be removed from critical duties. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave. This will continue until:

(A) an alcohol test indicates a result of less than 0.02;

(B) a negative drug test result is reported; or

(C) twenty-four hours elapse after the decision to test.

(5) An alcohol test should be administered as soon as possible and preferably within two hours after the decision to test was made. If the test is not administered within two hours, the substance control officer will record why the test was not administered until later. An alcohol test may not be administered after more than eight hours after the decision to test was made.

(6) A drug test should be administered as soon as possible. A drug test may not be administered more than 32 hours after the decision to test was made.

(d) Required training. Before making a decision to test, a supervisor or substance control officer must have been trained in the indications of drug and alcohol use and on the department's policy and procedures related to testing for cause.

§4.37. Test Results.

(a) An employee shall complete the following requirements if the employee has a positive drug test result or an alcohol test result of 0.04 or greater, if the employee refuses to test, or if the employee is a commercial driver, safety-sensitive employee, or vessel crewmember who violated §4.44(b)(1)-(5) of this subchapter.

(1) The supervisor or the substance control officer will mandatorily refer the employee to the EAP and require the employee to complete treatment.

(2) The employee will undergo a return-to-duty alcohol or drug test. An alcohol test must indicate a result of less than .02, and a drug test must indicate a verified negative result. An employee will be terminated from the department if the employee fails to pass the return-to-duty drug or alcohol test.

(3) The employee will provide a completed return-to-work form before resuming any critical duties. Commercial drivers, vessel crewmembers, and safety-sensitive employees who are not required to provide a return-to-work form will still be subject to a return-to-duty test.

(4) The employee will undergo follow-up testing for alcohol or drugs for up to 60 months. Follow-up testing will include at least 6 tests in the first 12 months after the employee's return to duty. The number and frequency of follow-up tests will be established by the EAP counselors. The EAP counselors may terminate the requirement for further testing at any time after the first six tests have been administered. An employee who fails to pass a follow-up drug or alcohol test has not completed treatment and will be terminated from the department.

(b) An employee will be terminated from the department if the employee refuses to test or has a positive drug test result or an alcohol test result of 0.04 or greater and is still in the employee's initial six-month probation period.

(c) If an employee has an alcohol test with a result of 0.02 or greater but less than 0.04, the supervisor or the substance control officer will prohibit the employee from working for 24 hours and will require the employee to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

§4.38. Test Procedures.

(a) General procedures. A person to be tested shall report to the test site designated by the department and follow the directions of testing officials. Alcohol and drug testing conducted under this title will comply with the procedures set forth in 49 CFR, Part 40.

(b) Costs. Alcohol and drug tests will be conducted at department expense with the exception of a split specimen test. The employee must pay for a split specimen test, which occurs when the employee requests separate testing of the second of two contemporaneous samples.

(c) Retest. If a negative drug test has a creatinine and specific gravity value lower than expected for human urine, the employee will be directed to take another test immediately.

§4.39. Refusal To Test.

(a) Employees in general. The department will mandatorily refer an employee to the EAP if the employee refuses to test, except commercial drivers, safety-sensitive employees, and vessel crewmembers.

(b) Commercial drivers, safety-sensitive employees, and vessel crewmembers. A commercial driver, safety-sensitive employee, or vessel crewmember will be terminated from the department if the employee refuses to test.

(c) Covered conduct. An employee will be considered to have refused to test under any of the following circumstances.

(1) The employee explicitly declines to take a required test, whether a first test or a subsequent test.

(2) The employee fails to appear for an alcohol or drug test, except a pre-employment test, within a reasonable time, as determined by the department, after being directed to do so.

(3) The employee fails to remain at the testing site until the testing process is complete. In the case of a pre-employment test, a final applicant who leaves the testing site before the testing process begins has not refused to test.

(4) The employee does not attempt to provide a breath specimen for a required alcohol test or to provide a urine specimen for a required drug test.

(5) The employee does not permit the observation or monitoring of the employee's provision of a specimen in the case of directly observed or monitored collection.

(6) The employee fails to provide a sufficient breath specimen or a sufficient amount of urine when directed and there is no adequate medical explanation for the failure, as determined through a required medical evaluation.

(7) The employee fails to undergo a medical examination or evaluation that was directed by an appropriate official. In the case of a pre-employment test, the final applicant has refused to test on this basis only if the test is conducted after the final applicant has been given a conditional offer of employment.

(8) The employee fails to sign the certification at Step 2 of the Alcohol Testing Form.

(9) The employee fails to cooperate in any part of the testing process, including refusing to empty pockets when so directed by the collector, behaving in a confrontational way that disrupts the collection process, or any other uncooperative behavior.

(10) The specimen contains levels of a substance that is lower than expected for human urine, a specimen that contains levels of a substance that are inconsistent with human urine, or a specimen has a creatinine and specific gravity value lower than expected for human urine.

(11) A commercial driver, safety-sensitive employee, or vessel crewmember does not remain available for a mandatory post-accident alcohol or drug test.

§4.40. Mandatory Referral and Treatment.

(a) Effect of referral. Except as otherwise provided in this subchapter, an employee who has a problem associated with alcohol or drug use will be mandatorily referred to the EAP if the problem may affect the employee's conduct or performance in the workplace. Until an employee provides a return-to-work form, the employee will be removed from critical duties.

(b) Procedure. The department will pay for the cost of counseling sessions provided by the EAP vendor, including an initial assessment. Employees who are referred by the EAP vendor to an outside treatment provider are responsible for any costs incurred as a result of the referral. An EAP counselor shall evaluate a referred employee to determine the extent of the dependence on alcohol or drugs and refer the employee to appropriate initial treatment, which shall include one or more of the following elements.

(1) An employee may participate in an inpatient rehabilitation treatment program and will not be able to work while enrolled in the program.

(2) An employee may participate in an intensive outpatient treatment program, which will provide individual counseling, group therapy, and educational services for varying lengths of time, normally up to 10 weeks. An employee participating in an outpatient program will normally be able to continue to work while participating in the program.

(3) An employee may participate in a counseling program that includes education or counseling sessions. The EAP counselors will prescribe the content, frequency, and duration of these sessions, as appropriate, and may include group or individual education or counseling sessions.

(c) Return to work. The EAP counselor will then refer the employee to a medical doctor or other licensed practitioner to complete a return-to-work form.

(d) No assistance needed. The EAP counselor will notify the employee's substance control officer in writing if the employee does not need assistance in resolving a problem associated with alcohol or drug use. A completed return-to-work form will not be required.

(e) Failure to complete treatment. An employee will be terminated from the department if the employee is mandatorily referred to the EAP and fails to complete treatment.

§4.41. Voluntary Admissions.

(a) Scope. In this section the term alcohol or drug problem includes alcohol or drug use in the workplace.

(b) Employees in general. An employee, other than a commercial driver, safety-sensitive employee, or vessel crewmember, will be subject to the following provisions if the employee voluntarily admits to an alcohol or drug problem.

(1) The employee will be removed from driving duties until the employee provides a completed return-to-work form.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(c) Commercial drivers, safety-sensitive employees, and vessel crewmembers. An employee who is a commercial driver, safety-sensitive employee, or vessel crewmember will be subject to the following provisions if the employee voluntarily admits to an alcohol or drug problem.

(1) The employee will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(3) The employee will be subject to all the requirements of §4.37 of this subchapter, except that the employee will not be required to undergo follow-up testing unless the employee admitted using alcohol or drugs while performing a critical duty.

(d) Disciplinary action. No disciplinary action will be taken against an employee solely because the employee voluntarily admitted having a drug or alcohol problem if the admission occurred prior to a determination that the employee should be subjected to testing for cause. This subsection supercedes any other provision in this subchapter.

§4.42. Recurrence of Substance Abuse.

(a) Recurrence as grounds for termination. An employee will be terminated instead of being referred to the EAP a second time. A second referral after a break in service will be treated as if there had been no break in service.

(b) Exceptions. It is not considered a mandatory referral within the meaning of this section if:

(1) an employee is assessed by the EAP counselors as not needing assistance in resolving problems associated with alcohol or drug use on a first mandatory referral; or

(2) an employee is referred for an alcohol- or drug-related driving offense.

(c) Effect of pre-1999 referrals. An employee will be terminated from the department if the employee received and completed one or two mandatory referrals before January 1, 1999, and that employee becomes subject to mandatory referral for a third time.

§4.43. Employees Who Drive for the Department.

(a) Scope. An employee who drives for the department is subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Records. District engineers, division directors, office directors, and the administration will maintain current lists of all employees who drive for the department. Each employee's driving record will be checked at least once each year. Each employee who drives for the department shall sign a form acknowledging awareness of the department's driving policies.

(c) Driver's licenses. An employee must have a valid driver's license to drive for the department. An occupational driver's license will be accepted if it allows the employee to perform driving duties for the department. Employees without a valid driver's license will be removed from all driving duties, and the supervisor will assign non-driving duties, if available.

(d) Loss of legal authority to drive.

(1) An employee shall notify the employee's supervisor if the employee loses the legal authority to drive as a result of any alcohol- or drug-related driving offense. If the employee fails to make this report within one day after returning to work following the loss of legal authority to drive, the employee will be suspended five days without pay. The five-day suspension will occur during a single work week if the employee is an FLSA-exempt employee.

(2) An employee will be terminated from the department if the employee drives for the department after losing the legal authority to drive as a result of any alcohol- or drug-related driving offense.

(e) Alcohol- and drug-related driving offenses. If an employee has an alcohol- or drug-related driving offense, the following procedures will be followed.

(1) An employee shall report an alcohol- or drug-related driving offense to the employee's supervisor. If the employee fails to make this report within one day after returning to work following the occurrence, the employee will be suspended five days without pay. The five-day suspension will occur during a single work week if the employee is an FLSA-exempt employee.

(2) The employee will be mandatorily referred to the EAP and required to complete treatment.

(3) The employee will be given a letter summarizing these actions. The employee shall acknowledge receipt by signing the letter and returning it to the supervisor.

(4) The employee will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(5) An employee will be terminated from the department after a second alcohol- or drug-related driving offense within five years.

(f) Final applicants.

(1) The department will not hire a final applicant for a position that may involve driving for the department if the final applicant has two alcohol- or drug-related driving offenses within three years before the date of application.

(2) The department will not hire a final applicant for a seasonal position that requires driving for the department if the final applicant has an alcohol- or drug-related driving offense within the three years before the date of application. A seasonal employee will be terminated if hired in violation of this paragraph.

(3) The department will not hire a final applicant for a position that involves driving for the department if the final applicant has an alcohol- or drug-related driving offense within three years before the date of application unless the final applicant agrees to:

(A) complete treatment; and

(B) comply with the procedures described in subsection (e) of this section.

§4.44. Commercial Drivers, Safety-Sensitive Employees, and Vessel Crewmembers.

(a) Scope. Commercial drivers, safety-sensitive employees, and vessel crewmembers are subject both to the requirements of this section and to the general requirements that apply to all employees.

(b) Prohibited activities. Commercial drivers, safety-sensitive employees, and vessel crewmembers shall not:

(1) report to work within four hours of consuming alcohol;

(2) report to work or remain at work while under the influence of alcohol or drugs;

(3) consume or possess alcohol while on duty or while driving a commercial motor vehicle;

(4) use alcohol within eight hours after an accident or before undergoing a post-accident alcohol test, whichever comes first;

(5) have a positive drug test result or an alcohol test result of 0.04 or greater; or

(6) refuse to test.

(c) Testing.

(1) The department will not hire or employ a final applicant for a position as a commercial driver, a safety-sensitive employee, or a vessel crewmember unless that final applicant passes a drug test.

(A) A current employee must pass a drug test before being transferred or promoted into a position as a commercial driver, safety-sensitive employee, or vessel crewmember. The department may waive this requirement if the employee was tested for drugs by the department during the preceding three-year period and all drug test results were negative and if the employee has never been mandatorily referred to the EAP. If a current employee is required to take a drug test under this subparagraph and fails that drug test, the employee will not

be transferred or promoted into the position and will be mandatorily referred to the EAP and required to complete treatment.

(B) The department will notify a final applicant of the results of a pre-employment drug test if the applicant requests those results in writing within 60 calendar days after being notified of the disposition of the employment application. The department will also inform the applicant which drugs, if any, were verified as positive.

(C) Pre-employment inquiries for commercial drivers and vessel crewmembers will be conducted in accordance with 49 CFR, Part 40.

(2) Commercial drivers and safety-sensitive employees are subject to post-accident testing if directly involved in a serious accident. Vessel crewmembers are subject to post-accident testing if directly involved in a serious marine accident.

(A) Nothing in this section requires or permits delaying medical attention for injured people or prohibits an employee from leaving the scene of an accident for as long as necessary to obtain assistance in responding to the accident or to obtain emergency medical care.

(B) Alcohol and drug tests will be administered after a serious accident or a serious marine accident.

(i) An alcohol test should be administered as soon as possible after a serious accident or a serious marine accident and preferably within two hours. If the test is not administered within two hours, it may be administered within eight hours. In that case, the substance control officer will record why the test was not promptly administered.

(ii) A drug test should be administered as soon as possible after a serious accident and in any event within 32 hours.

(iii) A drug test should be administered as soon as possible after a serious marine accident. If a drug test is not administered within 32 hours, it may be administered later. In that case, the substance control officer will record why the test was not promptly administered.

(C) The department will rely on a breath or blood test for the use of alcohol or a urine test for the use of drugs if it is conducted by federal, state, or local officials having independent authority for the test, if it conforms to applicable federal, state or local requirements, and if the department obtains the results of the tests.

(3) Commercial drivers and vessel crewmembers are subject to random alcohol and drug testing.

(A) Commercial drivers and vessel crewmembers will be selected for alcohol and drug testing on a random basis so that each employee has a substantially equal chance of selection. A commercial driver or vessel crewmember will be subject to the possibility of random testing as long as the employee is employed by the department in that capacity. The department may randomly test all commercial drivers in one or more sections if each section is equally subject to selection, and the department may randomly test all vessel crewmembers on one vessel as long as each vessel is equally subject to selection.

(B) The Human Resources Division will ensure that at least 10% of commercial drivers and 10% of vessel crewmembers are tested annually for alcohol and that at least 50% are tested annually for drugs.

(d) Administrative and disciplinary actions.

(1) A commercial driver, safety-sensitive employee, or vessel crewmember who violates subsection (b) of this section will be subject to all potential administrative and disciplinary actions available under this subchapter.

(2) The commercial driver, safety-sensitive employee, or vessel crewmember will be removed from critical duties until the employee provides a completed return-to-work form. The employee will be reassigned to temporary modified duties or will be required to take sick leave, vacation leave, compensatory time, or leave without pay. The employee will only be required to take leave without pay if the employee has exhausted all accrued leave.

(3) A final applicant for a position as a commercial driver, safety-sensitive employee, or vessel crewmember will not be hired if the final applicant has engaged in conduct that would violate subsection (b) of this section and has not received the equivalent of the required treatment. A commercial driver, safety-sensitive employee, or vessel crewmember will be terminated from the department if it is determined that at the time of hire, the applicant had engaged in conduct that would violate subsection (b) of this section and had not received the equivalent of the required treatment.

(e) Education. Each commercial driver, safety-sensitive employee, vessel crewmember, and supervisor of an employee in any of those categories will receive training on indications of alcohol or drug use and on the effects of alcohol and drug use on personal health, safety, and the work environment.

(f) Additional reporting requirements for vessel crewmembers.

(1) If a vessel crewmember receives a positive drug test result, the substance control officer shall report it in writing to the nearest Coast Guard Officer in Charge, Marine Inspection.

(2) A vessel crewmember who has received a positive drug test result may not perform vessel crewmember duties until found by the medical review officer to be drug free and to pose a sufficiently low risk for further illegal drug use. The employee must agree to follow-up testing determined by the medical review officer for an additional period of up to 60 months.

§4.45. Confidentiality.

(a) Prohibition on disclosure. Alcohol and drug test information shall be kept confidential except as required by law or in accordance with 49 CFR, Part 40.

(b) Records. All information relating to the substance abuse program will be maintained by the substance control officer in a locked file that is separate from that employee's standard personnel file. The information in this separate file will include mandatory referrals to the EAP, documentation of post-accident and reasonable cause determinations, and records of treatment, appeals, and litigation.

(c) Disciplinary action. An employee who willfully discloses confidential information relating to the substance abuse program, except in accordance with this subchapter, will be subject to disciplinary action, which may include termination from the department.

§4.46. Education.

The department will conduct an alcohol and drug-free awareness program providing all employees and supervisors with training on the department's policy, actions that will be taken for violations of the policy, the dangers of alcohol and drug abuse in the workplace, and the EAP.

This 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 July 26, 2002.

TRD-200204628
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-8630

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CHAPTER 15. TRANSPORTATION PLANNING AND PROGRAMMING

SUBCHAPTER A. TRANSPORTATION PLANNING

43 TAC §§15.2, 15.3, 15.7, 15.8

The Texas Department of Transportation (department) proposes amendments to §15.2, §15.3, §15.7, and §15.8, concerning transportation planning.

EXPLANATION OF PROPOSED AMENDMENTS

Federal transportation laws in Titles 23 and 49, United States Code, grant governors of states certain powers and responsibilities relating to transportation planning, including the responsibility to designate metropolitan planning organizations (MPOs), to determine the boundaries of metropolitan planning areas, and to approve statewide and metropolitan transportation improvement programs and any amendments. Previous governors have delegated these powers and responsibilities to the Texas Transportation Commission (commission) or the executive director of the department. Pursuant to these delegations, the commission previously adopted 43 TAC §§15.1-15.8 to prescribe how the commission or the executive director of the department would carry out these powers and responsibilities.

In a letter to Transportation Commission Chairman John W. Johnson dated June 13, 2002, Governor Rick Perry delegated certain powers and responsibilities under Titles 23 and 49, United States Code to the commission or its designees. Governor Perry retained the power and responsibility to designate or redesignate MPOs, to determine the boundaries of metropolitan planning areas, and to request the designation of additional transportation management areas.

The Transportation Equity Act for the 21st Century (TEA-21) repealed 23 U.S.C. §157, relating to the minimum allocation of funds to the states. Provisions in §15.2 and §15.7 relating to minimum allocation funds are no longer applicable. TEA-21 also amended 23 U.S.C. §134(c), relating to metropolitan area boundaries, to modify the transportation planning area boundary relationship to nonattainment area boundaries. Generally, future expansions of nonattainment area boundaries do not force expansion of the transportation planning area unless agreed to by the governor and the MPO. In order to comply with the requirements of federal law, provisions in §15.3 relating to metropolitan planning area boundaries have been amended.

Section 15.2 is amended to define governor to mean the governor of the State of Texas or his or her designee. This definition recognizes the governor's role in the transportation planning process, and recognizes that future governors may decide to delegate or retain powers and responsibilities in a manner that differs from their predecessor, without requiring an amendment to the rules. Section 15.2 is also amended to delete terms no longer used in the rules and to correct citations to federal law.

In order to comply with Governor Perry's delegation, §15.3 is amended to provide that the governor will designate or redesignate MPOs and will approve metropolitan planning area boundaries. In order to comply with the requirements of federal law, §15.3 is amended to provide that in urbanized areas previously designated as nonattainment for ozone or carbon monoxide under the Clean Air Act, the metropolitan planning area boundaries in existence as of the date of enactment of TEA-21 will be retained. Expanded nonattainment area boundaries will be included within the boundaries of the metropolitan planning area to the extent agreed to by the governor and the MPO. Section 15.3 is also amended to provide that metropolitan planning area boundaries may include new nonattainment areas as agreed to by the governor and the MPO.

Sections 15.3, 15.7, and 15.8 are amended to recognize that the governor must approve metropolitan and rural transportation improvement programs (TIPs) and any amendments, and the statewide transportation improvement program (STIP) and any amendments. This authority was delegated to the commission or its designees in Governor Perry's June 13, 2002, letter. Those sections are also amended to provide that if the governor delegates that authority, the commission or the executive director, as the case may be, will carry out those responsibilities in accordance with the requirements prescribed in those sections.

In order to facilitate public involvement in the development of TIPs and the review of those programs, §15.7 is amended to require MPOs to submit electronic and printed copies of their TIPs to the department using the uniform format. Section 15.8 is amended to provide that the proposed and approved STIP and any amendments will be made available on the department's website. Section 15.7 is also amended to correct citations to federal law changed under TEA-21.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each year of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the amendments as proposed.

James L. Randall, P.E., Director, Transportation Planning and Programming Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

Mr. Randall has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improved coordination between the department, the governor, and the MPOs in carrying out transportation planning responsibilities. There will be no adverse economic effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed rules. The public hearing will be held at 9 a.m. on August 26, 2002, in the first floor hearing room of the Dewitt

C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to James L. Randall, P.E., Director, Transportation Planning and Programming Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on September 9, 2002.

STATUTORY AUTHORITY

The amendments are proposed for adoption under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

No statutes, articles, or codes are affected by the proposed amendments.

§15.2. Definitions.

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

(1) Clean Air Act Amendments of 1990 (CAAA)--Amendments to the Clean Air Act of 1970 (CAA) (42 U.S.C. §7401 [~~§7410~~] et seq.), including procedures that apply to all transportation plans, programs, and projects as they relate to air quality.

(2) Commission--The Texas Transportation Commission.

(3) Conformity--Clean Air Act requirements that transportation plans and transportation improvement programs in nonattainment or maintenance areas meet the intent of the Texas State Implementation Plan (SIP) and the U.S. Environmental Protection Agency (EPA) conformity regulations contained in 40 C.F.R. Part 51. Emissions caused by transportation plans and programs in these areas must not exceed the level of motor vehicle emissions allowed in Texas' SIP and the EPA regulations.

(4) Corridor--A broad geographical band with no predefined size or scale that follows a general directional flow connecting major sources of trips. It involves a nominally linear transportation service area that may contain a number of streets, highways, and transit route alignments.

(5) Department--The Texas Department of Transportation.

(6) District--One of the 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(7) Environmental Protection Agency (EPA)--The federal agency primarily responsible for environmental protection, including air quality as it relates to this subchapter.

(8) Executive director [~~Director~~]--The executive director of the Texas Department of Transportation or his or her designee.

(9) Federal discretionary program--Special set-aside funds to be included as line item discretionary projects designated by the United States Congress.

(10) Federal Highway Administration (FHWA)--The federal agency primarily responsible for highway transportation.

(11) Federal Transit Administration (FTA)--The federal agency primarily responsible for public mass transportation.

(12) Governor--The governor of the State of Texas or his or her designee.

[~~(12) Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)--The transportation act passed by Congress that provides six year authorizations for development of a National Intermodal Transportation System which consists of all forms of transportation in a unified interconnected manner.~~]

(13) Major revision--An amendment to the Statewide Transportation Improvement Program involving a reallocation of funds between two or more districts or two or more metropolitan planning organizations or a metropolitan planning organization and a district.

(14) Metropolitan planning organization (MPO)--The forum for cooperative transportation decision making for the metropolitan planning area. The MPO is also the organization that is responsible for carrying out the transportation planning process for the metropolitan area.

(15) Metropolitan planning organization policy board--The forum and committee structure (e.g., Regional Transportation Council, Steering Committee, Policy Advisory Committee) established under Section 134 of Title 23, U.S. Code, Section 5303 of Title 49, U.S. Code, and the Governor's Designation Agreement as the group responsible for giving an MPO overall transportation policy guidance.

[~~(16) Minimum allocation funds--Funds allocated by the U.S. Secretary of Transportation among the states under 23 U.S.C. §157(a).~~]

(16) [~~(17)~~] Mobility projects--Transportation projects that add additional mainlanes to an existing facility and which have a length of at least one mile.

(17) [~~(18)~~] Rural transportation improvement program--A staged, multiyear, intermodal program of transportation projects which is developed by the department, in consultation with local officials, for areas of the state outside of the metropolitan planning area boundaries. The rural TIP includes a financially constrained plan that demonstrates how the program can be implemented.

(18) [~~(19)~~] Subarea--An area with no predefined size or scale that focuses on a non-linear part of a metropolitan area, such as an activity center or other geographic portion of a region.

(19) [~~(20)~~] Surface Transportation Program (STP)--The block grant type program established by 23 U.S.C. §133.

(20) [~~(21)~~] Texas Natural Resource Conservation Commission (TNRCC)--The state agency responsible for coordination of natural resources and air quality for the state, including development of the State Implementation Plan.

(21) [~~(22)~~] Transportation control measure (TCM)--Any measure used for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions.

(22) [~~(23)~~] Unified Planning Work Program (UPWP)--The governing planning document, prepared by an MPO on an annual basis, which identifies the transportation planning work to be undertaken within the metropolitan planning area.

§15.3. Organization, Structure, and Responsibilities of Metropolitan Planning Organizations.

(a) Purpose. Under 23 U.S.C. §134 and 49 U.S.C. §5303, as implemented by 23 C.F.R. Part 450, Subpart C, a metropolitan planning organization must be designated in each urbanized area, and each MPO must have a continuing, cooperative, and comprehensive transportation planning process that results in plans and programs which consider all transportation modes and support metropolitan community development and social goals. This section describes the process for designating MPOs, adding members to an MPO, setting metropolitan planning area boundaries, coordinating metropolitan planning among MPOs, transit operators, and the department, and prescribes the responsibilities of MPOs.

(b) Designations, redesignations, and membership of MPOs.

(1) Designations.

(A) A designation of an MPO shall be by agreement between the governor [~~executive director~~] and local units of government representing 75% of the affected metropolitan population (including the central city or cities as defined by the Bureau of the Census), and shall be carried out in accordance with 23 C.F.R. §450.306. More than one MPO may be designated within an urbanized area only if the governor [~~executive director~~] determines that the size and complexity of the urbanized area makes designation of more than one MPO appropriate.

(B) Existing MPO designations remain valid until a new MPO is designated, unless revoked by the governor [~~executive director~~] and local units of government representing 75% of the population in the area served by the existing MPO in accordance with 23 C.F.R. §450.306(f). The central city must be among those desiring to revoke the MPO designation.

(2) Redesignations.

(A) The designation of a new MPO to replace an existing MPO shall occur by agreement of the governor [~~executive director~~] and affected local units of government representing 75% of the population in the entire metropolitan planning area. The central city(ies) must be among the units of local government agreeing to the redesignation.

(B) Redesignation of an MPO in a multistate metropolitan area requires the approval of the governor [~~executive director~~] and the governor's counterpart in [~~governor, or his or her designee, of~~] the other state, and of local officials representing 75% of the population in the entire metropolitan planning area. The local officials in the central city must be among those agreeing to the redesignation.

(C) Redesignation of an MPO covering more than one urbanized area requires the approval of the governor [~~executive director~~] and local officials representing 75% of the population in the metropolitan planning area covered by the current MPO. The local officials in the central city(ies) in each urbanized area must be among those agreeing to the redesignation.

(D) If the governor [~~executive director~~] and local officials decide to redesignate an existing MPO, but do not formally revoke the existing MPO designation, the existing MPO remains in effect until a new MPO is formally designated.

(3) Membership of MPOs. Adding membership (e.g., local elected officials and operators of major modes or systems of transportation, or representatives of newly urbanized areas) to the policy body or expansion of the metropolitan planning area does not automatically require redesignation of the MPO. To the extent possible, it is encouraged that this be done without a formal redesignation. The governor [~~executive director~~] and the MPO will [~~shall~~] review the previous MPO designation, state and local law, MPO bylaws, and any other relevant documentation to determine if this can be accomplished without a formal redesignation.

(c) Metropolitan planning area boundaries.

(1) Minimum area.

(A) General. Except as otherwise provided in subparagraph (B) of this paragraph, the [~~The~~] metropolitan planning area boundary shall, at a minimum, cover the existing urbanized area(s) and the contiguous geographic area likely to become urbanized within the 20 year forecast period covered by the transportation plan, and shall include the boundaries required by 23 C.F.R. §450.308. Metropolitan planning area boundaries shall be limited to the boundaries approved by the governor, and may include new nonattainment areas as agreed to by the governor and the MPO [~~executive director~~].

(B) Existing nonattainment areas. In the case of an urbanized area designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act, the boundaries of the metropolitan planning area in existence as of the date of enactment of the Transportation Equity Act for the 21st Century (TEA-21) shall be retained. Future expansion of nonattainment boundaries will be included within the boundaries of the metropolitan planning area to the extent agreed to by the governor and the MPO. [~~For geographic areas designated as nonattainment or maintenance areas (as created by the CAAA) for transportation related pollutants under the Clean Air Act of 1970, the boundaries of the metropolitan planning area shall include at least the boundaries of the nonattainment or maintenance areas, except as otherwise approved by the executive director. Proposals to exclude a portion of the nonattainment or maintenance area from the planning area boundary shall be coordinated with the FHWA, FTA, EPA, and TNRCC before a final decision is made. In the absence of a formal agreement between the executive director and the MPO to reduce the metropolitan planning area to an area less than the boundaries of the nonattainment or maintenance area, the entire nonattainment or maintenance area is subject to the applicable provisions of this subchapter.~~]

(2) Boundary establishment. The metropolitan planning area for a new urbanized area served by an existing or new MPO shall be established in accordance with this subsection. The current planning area boundaries for previously designated urbanized areas shall be reviewed and modified if necessary to comply with the criteria identified in this subsection.

(3) Coordination with other transportation modes. In addition to the criteria contained in this subsection, the planning areas currently in use for all transportation modes must be reviewed before

establishing the metropolitan planning area boundary, and adjusted, if appropriate, in accordance with 23 C.F.R. §450.308.

(4) Approval of boundaries. Approval of metropolitan area boundaries by the FHWA or the FTA is not required. However, metropolitan planning area boundary maps must be provided to the department for further handling with the FHWA and the FTA, after their approval by the governor [~~executive director~~]. Revisions to approved boundaries must also be approved by the governor [~~executive director~~]. The governor and the department must be provided documentation and the rationale supporting any recommended boundary change.

(5) Use of suballocated Surface Transportation Program funds. If a portion of a nonattainment or maintenance area (as defined by the CAAA) is excluded from the metropolitan planning area boundary, the Surface Transportation Program funds suballocated to urbanized areas greater than 200,000 in population may not be used for projects outside the metropolitan planning area boundary.

(d) Metropolitan planning area agreements.

(1) Planning contract. The responsibilities for cooperatively carrying out transportation planning (including corridor and subarea studies) and programming shall be clearly identified in the planning contract between the department and the MPO.

(2) MPO-transit operator planning agreement. There shall be a written agreement between the MPO and operators of publicly owned transit services that specifies cooperative procedures for carrying out transportation planning (including corridor and subarea studies) and programming as required by this subchapter.

(3) Agreements in nonattainment MPOs. If the metropolitan planning area does not include the entire nonattainment or maintenance area (as defined by the CAAA), there shall be a written agreement among the department, TNRCC, affected local agencies, and the MPO describing the process for cooperative planning and analysis of all projects outside the metropolitan planning area, but within the nonattainment or maintenance area. The agreement shall be in accordance with the requirements of 23 C.F.R. §450.310.

(4) Coordination of planning processes. If more than one MPO has authority within a metropolitan planning area or a nonattainment or maintenance area, there shall be a written agreement, consistent with the requirements of 23 C.F.R. §450.310, between the department and the MPOs describing how the processes will be coordinated to assure the development of an overall transportation plan for the metropolitan planning area. In metropolitan planning areas that are nonattainment or maintenance areas, the agreement shall include the TNRCC and any local air quality agencies.

(5) Existing agreements. For all requirements specified in paragraphs (1)-(4) of this subsection, existing agreements shall be reviewed for compliance and reaffirmed or modified as necessary to ensure participation by all appropriate modes.

(e) Responsibilities of MPOs.

(1) General. The MPO in cooperation with the department and with operators of publicly owned transit services shall be responsible for carrying out the metropolitan transportation planning process in accordance with 23 C.F.R. Part 450 and this subchapter. The MPO, the department, and transit operators shall cooperatively determine their mutual responsibilities in the conduct of the planning process, including corridor refinement (e.g., feasibility and major investment) studies. They shall cooperatively develop the Unified Planning Work Program, metropolitan transportation plan, and transportation improvement program. In addition, the development of the metropolitan transportation plan and transportation improvement program shall be coordinated with other providers of transportation (e.g., sponsors of regional airports, maritime port operators, and rail freight operators).

(2) Metropolitan transportation plan. The MPO shall approve the metropolitan transportation plan and its periodic updates.

(3) Metropolitan transportation improvement program. The MPO and the governor [~~executive director~~] shall approve the metropolitan transportation improvement program and any amendments. If the governor delegates this authority, the executive director shall approve the metropolitan transportation improvement program and any amendments found to be in accordance with §15.7(h) of this title (relating to Transportation Improvement Programs).

(4) Coordination with State Implementation Plan development. In nonattainment or maintenance areas, the MPO shall coordinate the development of the transportation plan with the State Implementation Plan (SIP) development process, including the development of any transportation control measures (TCMs). The MPO shall develop or assist in developing the TCMs. The MPO shall not approve any metropolitan transportation plan or transportation improvement program which does not conform with the SIP, as determined in accordance with EPA conformity regulations.

(5) Metropolitan planning in areas with multiple MPOs. If more than one MPO has authority in a metropolitan planning area (including multistate metropolitan planning areas) or in an area which is designated as nonattainment or maintenance for transportation related pollutants, the MPOs, the [~~executive director, and the~~] governor, and the governor's counterpart in [~~or his or her designee, of~~] any other involved state shall cooperatively establish the boundaries of the metropolitan planning area (including the 20 year planning horizon and relationship to the nonattainment or maintenance areas) and the respective jurisdictional responsibilities of each MPO. The MPOs shall consult with each other and the states to assure the preparation of integrated plans and transportation improvement programs for the entire metropolitan planning area. While an individual MPO metropolitan transportation plan and transportation improvement program may be developed separately, each plan and transportation improvement program must be consistent with the plans and transportation improvement programs of other MPOs in the metropolitan planning area. For the overall metropolitan planning area, the individual MPO planning process shall reflect coordinated data collection, analysis, and development. In those areas where this provision is applicable, coordination efforts shall be initiated and the process and outcomes documented in subsequent transmittals of the Unified Planning Work Program and various planning products (e.g., the metropolitan transportation plan and transportation improvement program) to the department for further transmittal to the FHWA and the FTA.

§15.7. Transportation Improvement Program (TIP).

(a) Requirements. Title 23, Code of Federal Regulations, §450.324, requires the metropolitan transportation planning process to include the development of a transportation improvement program for the metropolitan planning area, containing a list of projects which have been approved for development in the near term. The transportation improvement program is required to be developed in cooperation with the department and public transit operators, and must be approved by the MPO and the governor [~~department~~]. After approval and any needed conformity findings, a TIP is included without modification in the statewide transportation improvement program. After inclusion, the MPO and the department will select projects for implementation in accordance with 23 C.F.R. §450.332. This section describes how a transportation improvement program and its financial plan will be developed, projects required to be included in a TIP, consistency and conformity requirements, the format of a TIP, the TIP approval process, how a TIP is updated and modified, public involvement in

TIP development, and project selection procedures. This section also describes the development of rural TIPs by the department. Development of rural TIPs is part of the STIP development process described in §15.8 of this title (relating to the Statewide Transportation Improvement Program).

(b) Development.

(1) Metropolitan TIP. The MPO designated for a metropolitan planning area, in cooperation with the department and publicly owned transit operators, shall develop a transportation improvement program and financial plan in accordance with the requirements of 23 C.F.R. §450.324. The department shall provide an MPO with estimates of available federal and state funds to be used in developing the financial plan. The TIP shall cover the metropolitan planning area and shall be updated and approved at least every two years by the MPO and the governor [~~department~~]. The TIP shall include all projects, except those described in subsection (d) of this section, to be funded under Titles 23 and 49 of the U.S. Code, including those projects required to be included by 23 C.F.R. §450.324(f).

(2) Rural TIP. The department shall develop transportation improvement programs for all areas of the state outside of metropolitan planning areas. These rural TIPs will be developed in accordance with the requirements of 23 C.F.R. §450.216 and §15.8 of this title (relating to Statewide Transportation Improvement Programs), will exclude the projects required to be excluded by those sections, and will become part of the STIP after approval by the governor [~~executive director~~].

(c) Grouping of projects. Projects that are not considered by the department and the MPO to be of appropriate scale for individual identification in a given program year may be grouped by function, geographic area, or work type (e.g., rehabilitation, seal coating). In nonattainment and maintenance areas, classification must be consistent with the exempt project classifications contained in the EPA conformity regulations.

(d) Projects excluded. The following projects may be excluded from the metropolitan TIP by agreement between the department and the MPO:

(1) safety projects funded under 23 U.S.C. §402 (highway safety programs), and emergency relief projects, except those involving substantial functional, location, and capacity changes;

(2) planning and research activities, except those activities funded with National Highway System or [~~,~~] Surface Transportation Program [~~, or Minimum Allocation~~] funds other than those used for major investment studies; and

(3) projects under 23 U.S.C. §104(b)(1), 23 U.S.C. §104(b)(4) [~~§104(b)(5)(A)-(B)~~], and 23 U.S.C. §144 that are for resurfacing, restoration, rehabilitation, reconstruction, or highway safety improvement, and which will not alter the functional traffic capacity or capability of the facility being improved.

(e) Consistency and conformity.

(1) Metropolitan transportation plan. A project in the metropolitan TIP must be consistent with the metropolitan transportation plan. The unique project identification number for each project that was included in the metropolitan transportation plan will be the same number and will be referenced for each project in the TIP.

(2) Statewide transportation plan. A project in the rural TIP must be consistent with the statewide transportation plan developed under 23 C.F.R. §450.214.

(3) Clean Air Act Amendments and State Implementation Plan. In nonattainment and maintenance areas, a project selected for the TIP must conform with the Clean Air Act Amendments and state implementation plan.

(4) Conformity requirements. The MPO in each urbanized nonattainment and maintenance area will be responsible for preparation of the conformity finding requirements of the CAAA and the EPA conformity regulations. The department will be responsible for preparation of the conformity finding requirements in nonattainment and maintenance areas outside of metropolitan planning areas.

(f) Format. The department, in consultation with the MPOs, will develop a uniform TIP format to produce a uniform STIP. The department in consultation with the MPOs may make modifications to the format. The MPOs shall submit electronic and printed copies of their TIPs [~~TIP~~] to the department in this format.

(g) Financial plan. A financial plan that demonstrates consistency with funding reasonably expected to be available during the relevant period shall be developed for metropolitan TIPs by the MPO in cooperation with the department and transit operators. A financial plan does not need to include a project funded under a federal discretionary program.

(h) TIP approval. Under 23 U.S.C. §134 and 49 U.S.C. §5304, the MPO and the governor [~~executive director~~] shall approve the metropolitan TIP and any amendments [~~found to be in accordance with this section~~]. If the governor delegates this authority, the [~~The~~] executive director will approve metropolitan and rural TIPs if he or she finds the TIP has met all the requirements of this section, §15.8 of this title (relating to Statewide Transportation Improvement Programs), 23 U.S.C. §134 and §135, 49 U.S.C. §5304, and that the TIP:

(1) develops, operates, and maintains efficient and effective transportation systems and services;

(2) improves public safety and security on transportation systems;

(3) facilitates economic and social prosperity through the efficient movement of people and goods;

(4) protects, where feasible, and enhances the environment, where practicable, in transportation activities;

(5) improves and promotes the connectivity of transportation services and systems; and

(6) optimizes transportation funding to meet the mobility needs of the state.

(i) Management. As a management tool for monitoring progress in implementation of the metropolitan transportation plan, the metropolitan TIP shall identify the criteria and process for prioritizing implementation of transportation plan elements for inclusion in the TIP and any changes in priorities from previous TIPs in accordance with the factors specified in 23 C.F.R. §450.324(n).

(j) Updating. The frequency and cycle for updating the TIP must be compatible with the STIP development process established by the department and described in §15.8(b) of this title (relating to Statewide Transportation Improvement Programs).

(k) Modification.

(1) Amendments. The TIP may be amended consistent with the procedures established in this section for its development and approval with the following stipulations.

(A) An amendment to the TIP is required in attainment areas if there is a change:

(i) adding or deleting a federally funded project in the TIP;

(ii) in the scope of work of a federally funded project;

(iii) in the phase of work (such as the addition of preliminary engineering, construction, or right-of-way) of a federally funded project;

(iv) in the TIP year if the MPO's project selection procedure does not provide for selecting projects from the second or third year; or

(v) in funding sources that forces the addition or deletion of federally funded projects.

(B) An amendment to the TIP is required in nonattainment areas if there is a change:

(i) adding or deleting a project in the TIP;

(ii) in a project's scope of work;

(iii) in the phase of work (such as the addition of preliminary engineering, construction, or right-of-way) of a project;

(iv) in the TIP year if the MPO's project selection procedure does not provide for selecting projects from the second or third year;

(v) adding Congestion Mitigation and Air Quality funding to a previously approved project; or

(vi) in funding from non-federal funding to any combination of federal funding or federal and state funding, or where the change in funding sources forces the addition or deletion of federally funded projects or regionally significant state funded projects.

(C) An amendment to the TIP is not required if there is a change:

(i) in funding sources, except as provided in this subsection;

(ii) in the cost estimate which is not caused by a change in the project work scope or limits; or

(iii) in the letting date unless, in nonattainment areas, the change affects conformity.

(2) Conformity requirements. In nonattainment and maintenance areas for transportation related pollutants, a conformity determination must be made on any new or amended TIPs (unless the amendment consists entirely of projects exempt under subsection (c) of this section) in accordance with CAAA requirements and the EPA conformity regulations.

(l) TIP relationship to STIP.

(1) Metropolitan TIP. After approval by the MPO and the governor [~~executive director~~], the TIP will be included without modification in the STIP except that in nonattainment and maintenance areas, the FHWA and the FTA must make a conformity finding before inclusion. The department will notify the MPO and appropriate federal agencies when a TIP has been included in the STIP.

(2) Rural TIP. After approval by the governor [~~executive director~~], rural TIPs will be included in the STIP, except in nonattainment and maintenance areas outside metropolitan planning areas, where federal findings of conformity must be made prior to placing projects in the STIP.

(m) TIP public involvement.

(1) Metropolitan public involvement process. Each MPO will develop a public involvement process covering the development of a metropolitan TIP in accordance with 23 C.F.R. §450.324(c) and §15.5(c) of this title (relating to the metropolitan planning process). The MPOs shall also use adopted public involvement procedures in amending the TIP.

(2) Rural public involvement process.

(A) Initial adoption. Each department district will develop and implement a public involvement process covering the development of a rural TIP that, at a minimum, consists of the following:

(i) publication, in a newspaper with general circulation in each county within the district, of a notice informing the public of the availability of the proposed rural TIP and of a 10 day public comment period;

(ii) a request, in the published notice, for public comments concerning the proposed rural TIP, to be submitted in writing to the district; and

(iii) notification, in the published notice, that a public hearing will be held in order to receive comments on the initial adoption, along with a public comment period of at least 10 days subsequent to the hearing. The notice of public hearing will be published a minimum of 10 days prior to the hearing.

(B) Revisions involving mobility projects. Each district will, at a minimum, publish, in a local newspaper of general circulation, a notice informing the public of the availability of these revisions and of a 10 day public comment period. The notice will also request public comments to be submitted, in writing, to the district, and will also notify the public that a public hearing will be conducted to receive comments on the proposed revision.

(n) Project selection procedures. Under 23 C.F.R. §450.332, project selection from an approved metropolitan transportation improvement program varies depending on whether a project selected for implementation is located in a transportation management area and what type of federal funding is involved. The purpose of this subsection is to prescribe project selection procedures and specify which entity may select a project for implementation.

(1) General. Project selection procedures must be developed for each metropolitan area and for state projects that lie outside of metropolitan planning areas. The department will develop and reevaluate annual project selection procedures for state projects which lie outside of metropolitan planning areas in accordance with §15.8(g) of this title (relating to Statewide Transportation Improvement Programs).

(A) Project agreement. The first year of both the TIP and the STIP constitute an agreed to list of projects for project selection purposes. Project selection may be revised if the apportioned funds, including the highway obligation ceiling and transit appropriations, are significantly less than the authorized funds. In such cases, if requested by the MPO, the department, or the transit operator, a revised agreed to list of projects for project selection purposes may be developed.

(B) Eligibility. Only projects included in the federally approved STIP will be eligible for funding with Title 23, U.S. Code, or Federal Transit Act (49 U.S.C. §5301 et seq.) funds.

(2) Project selection in non-transportation management areas. In an area not designated as a TMA, the department or the transit operator, in cooperation with the MPO, will select projects to be implemented using federal funds from the approved metropolitan TIP. Federal lands highways program projects shall be selected in accordance with 23 U.S.C. §204.

(3) Project selection in TMAs.

(A) Selection by MPO. In an area designated as a TMA, all Title 23, U.S. Code and Federal Transit Act funded projects, except projects on the National Highway System and projects funded under the bridge, interstate maintenance, safety, enhancement, and Federal lands highways programs, shall be selected by the MPO in consultation with the department and transit operators from the approved metropolitan TIP and in accordance with the priorities of the approved metropolitan TIP.

(B) Selection by the department. In an area designated as a TMA, the department, in cooperation with the MPO, will select projects on the National Highway System and projects funded under the bridge, interstate maintenance, safety, and enhancement programs from the approved metropolitan TIP. Federal lands highways program projects shall be selected in accordance with 23 U.S.C. §204.

§15.8. Statewide Transportation Improvement Program (STIP).

(a) Purpose. Title 23, U.S. Code, §135, as implemented by 23 C.F.R. Part 450, Subpart B, requires each state to carry out a continuing, comprehensive, and intermodal statewide transportation planning process, including the development of a statewide transportation plan and transportation improvement program, that facilitates the efficient, economic movement of people and goods in all areas of the state, including those areas subject to the metropolitan planning requirements of 23 U.S.C. §134 and 23 C.F.R. Part 450, Subpart C. This section describes the STIP development process, funding for projects included in the STIP, public involvement in STIP development, the STIP approval process, the STIP revision process, and project selection procedures.

(b) STIP development. The department will develop a STIP for all areas of the state in cooperation with the MPOs designated for metropolitan areas.

(1) Projects included.

(A) A highway or transit project funded under Title 23, U.S. Code or the Federal Transit Act (49 U.S.C. §5301 et seq.) will be included in a federally approved STIP. A project in the STIP will be consistent with the statewide long-range transportation plan and metropolitan TIPs, and the program will reflect expected funding and priorities for programming.

(B) Projects that are not considered by the department and MPO to be of appropriate scale for individual identification in a given program year (e.g., rehabilitation, seal coating, elderly or disabled transit projects) may be grouped by function, geographic area, or work type.

(C) In a nonattainment area, only those projects which have been determined to conform with the requirements of the CAAA and which comply with the state implementation plan may be included in the STIP.

(D) Regionally significant projects to be funded with non-federal funds will be included in the STIP for planning, coordination, and public disclosure purposes.

(2) STIP funding. The federal funding level for each year of the STIP is the annual authorization as outlined in 23 U.S.C. §101 et seq. and funds appropriated under 49 U.S.C. §5301 et seq., in addition to the appropriate state and local match.

(c) STIP financial plan. The STIP will reflect the priorities for programming and expenditure of funds and will:

(1) include a financial plan that demonstrates how the transportation improvements can be funded and reasonably implemented;

(2) be consistent with funding reasonably expected to be available during the relevant period; and

(3) be financially constrained by year.

(d) STIP public involvement process. Under 23 U.S.C. §135, the governor is responsible for providing for public involvement in the STIP development process. If the governor delegates this responsibility, the department will provide for public involvement in accordance with this subsection [~~The governor has delegated this responsibility to the commission, which in turn has delegated the responsibility to the executive director~~].

(1) Initial adoption. In developing the STIP, the department will hold at least one statewide public hearing regarding the adoption of the proposed STIP with an available comment period of at least 10 days subsequent to the hearing.

(A) The department will publish a notice of the hearing in the *Texas Register* a minimum of 10 days prior to it being held.

(B) A copy of the proposed STIP will be available for review, at the time the notice of hearing is published, at each of the department's district offices, [~~and~~] at the department's Transportation Planning and Programming Division offices in Austin, and on the department website.

(C) The approved STIP will also be made available at each of the department's district offices, [~~and~~] at the Transportation Planning and Programming Division offices in Austin, and on the department website.

(2) STIP amendments.

(A) General. The governor [~~executive director~~] will approve amendments to the STIP. If the governor delegates this authority, the executive director will approve amendments according to a published schedule developed in accordance with subsection (f) of this section, which the department will make available at the department's district offices , [~~and~~] to the MPOs, and on the department website on an annual basis.

(B) Amendments to the STIP involving a major revision.

(i) The department will publish in the *Texas Register* notification of the availability of copies of proposed STIP amendments involving a major revision. Copies of these amendments will be made available at each of the department's district offices , [~~and~~] at the Transportation Planning and Programming Division offices in Austin, and on the department website.

(ii) The published notice will initiate a 10 day public comment period and will inform the public where to send any written comments.

(iii) The department will accept written comments on the proposed STIP amendments during the 10 day public comment period.

(e) STIP approval.

(1) The governor [~~commission~~] will approve the STIP. If the governor delegates this authority, the commission will approve the STIP if it finds the STIP has met all the requirements of this section and that the STIP:

(A) develops, operates, and maintains efficient and effective transportation systems and services;

(B) improves public safety and security on transportation systems;

(C) facilitates economic and social prosperity through the efficient movement of people and goods;

(D) protects, when feasible, and enhances, when practicable, the environment in transportation activities;

(E) improves and promotes the connectivity of transportation services and systems; and

(F) optimizes transportation funding to meet the mobile needs of the state.

(2) The governor, or if delegated this authority, the commission may approve a partial STIP if difficulties are encountered in cooperatively developing the TIP portion for a particular metropolitan or rural area.

(f) STIP revisions.

(1) Schedule of revisions. The department and the MPOs will be required to adhere to a quarterly STIP revision cycle, except as provided in paragraph (2) of this subsection. Project information and MPO approval documentation for the quarterly revisions must be received by the department's Transportation Planning and Programming Division by the close of business on the first working day of the revision month.

(2) Exceptions. The executive director may approve an exception to this requirement if:

(A) additional funding becomes available; or

(B) the revision involves a project which is expected to have a significant effect on capacity, connectivity, or public safety and security on transportation systems.

(g) Project selection procedures. Under 23 C.F.R. §450.222, project selection from an approved STIP varies depending on whether a project selected for implementation is located in a metropolitan planning area and on what type of federal funding is involved. The purpose of this subsection is to prescribe project selection procedures and specify which entity may select a project for implementation.

(1) General. Project selection procedures must be developed for each metropolitan area and for state projects that lie outside of metropolitan planning areas. The department will develop and reevaluate annual project selection procedures for state projects which lie outside of metropolitan planning areas.

(A) Project agreement. The first year of both the TIP and the STIP constitute an agreed to list of projects for project selection purposes. Project selection may be revised if the apportioned funds, including the highway obligation ceiling and transit appropriations, are significantly less than the authorized funds. In such cases, if requested by the MPO, the department or the transit operator, a revised agreed-to list of projects for project selection purposes may be developed.

(B) Eligibility. Except as provided in 23 C.F.R. §450.222 [~~§450.322(a)~~], only those projects included in the federally approved STIP will be eligible for funding with Title 23, U.S.C., or Federal Transit Act (49 U.S.C. §5301 et seq.) funds.

(2) Project selection in metropolitan planning areas. In metropolitan planning areas, transportation projects shall be selected in accordance with the project selection procedures established in §15.7(n) of this title (relating to Transportation Improvement Programs).

(3) Project selection outside metropolitan planning areas. Outside metropolitan planning areas, transportation projects undertaken on the National Highway System with Title 23 funds and under the bridge and interstate maintenance programs shall be selected by the department in consultation with affected local officials. Federal lands highways projects shall be selected in accordance with 23 U.S.C. §204. Other transportation projects undertaken with funds administered by the FHWA shall be selected by the department in cooperation with the affected local officials, and projects undertaken with Federal Transit Act funds shall be selected by the department in cooperation with the affected local officials and transit operators.

This 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 July 26, 2002.

TRD-200204629
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-8630

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CHAPTER 17. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §17.49

The Texas Department of Transportation (department) proposes new §17.49, concerning registration of fleet vehicles.

EXPLANATION OF PROPOSED NEW SECTION

House Bills 1368 and 2124, 77th Legislature, 2001, require the department to develop and implement a system of registration so that an owner of a fleet of motor vehicles may consolidate the registration of the vehicles in that fleet as an alternative to the separate registration of each motor vehicle in the fleet. HB 1368 and HB 2124 require the department to define what constitutes a fleet and authorize the department to adopt rules to administer the consolidated registration system.

New §17.49 is added to define a fleet for purposes of fleet registration and to prescribe the policies and procedures that will be followed by the department in implementing fleet registration.

Section 17.49(a) establishes the scope of the section.

Section 17.49(b) sets minimum requirements for fleet registration. A fleet must consist of at least 25 vehicles registered in the name of a single person, and each vehicle must be titled or registered in Texas or an application for title or registration must be pending. These are minimal requirements necessary for efficient operation of the system.

Section 17.49(c) establishes the information that must be provided in an application for fleet registration. This information is comparable to the information provided when vehicles are registered separately.

Section 17.49(d) sets a single, coordinated registration period for all vehicles in a fleet. This provision will ease the paperwork burden on registrants and on the department.

Section 17.49(e) sets standards for the handling of fleet registration insignia. In general, insignia will be handled in the same manner as current windshield stickers. The exception is that fleet

registrants will be required to maintain copies of the registration receipt in each vehicle. Since fleet registration insignia may be issued on a multi-year basis, this provision is necessary so law enforcement personnel will be able to confirm that a vehicle's registration is current.

Section 17.49(f) sets the manner in which vehicles may be added to or removed from a fleet. These requirements are designed to maintain the efficiency of a single registration period for all fleet vehicles while minimizing the burden of processing paperwork.

Section 17.49(g) establishes the way in which the payment of fees will be coordinated when fleets are created and when vehicles are added or removed. Essentially, registrants will be credited for the unexpired portion of any current registration, and fees will be prorated when the new registration period for any vehicle is less than a year. As a result, there should be no net additional cost from excess or lost fees, either to the department or to registrants. There will, however, be a net cost saving from a more efficient registration system for fleet vehicles.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for each of the first five years the new section is in effect, there will be fiscal implications for the state as a result of enforcing or administering the new section. The fiscal impact to the department is a savings of $98,000 per fiscal year. There are no fiscal implications for local governments. There are no anticipated economic costs for persons required to comply with the new section as proposed.

Jerry L. Dike, Director, Vehicle Titles and Registration, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

PUBLIC BENEFIT

Mr. Dike has also determined that for each year of the first five years the new section is in effect, the public benefit anticipated as a result of enforcing or administering the new section will be to reduce paperwork for businesses registering fleet vehicles. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed new section may be submitted to Jerry L. Dike, Director, Vehicle Titles and Registration Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on September 9, 2002.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §502.0022, which requires the department by rule to define fleet for purposes of this section and authorizes the department to adopt rules to administer this section.

No statutes, articles, or codes are affected by the proposed new section.

§17.49. Registration of Fleet Vehicles.

(a) Scope. A registrant may consolidate the registration of multiple motor vehicles in a fleet instead of registering each vehicle separately. This section prescribes the policies and procedures for fleet registration.

(b) Eligibility. A fleet must meet the following requirements to be eligible for fleet registration.

(1) No fewer than 25 vehicles will be registered as a fleet.

(2) All vehicles in a fleet must be registered to the same person.

(3) Each vehicle must currently be titled in Texas or be issued a registration receipt, or the registrant must submit an application for a certificate of title or registration for each vehicle.

(c) Application.

(1) Application for fleet registration must be on a form prescribed by the department. At a minimum the form will require:

(A) the full name and complete address of the registrant;

(B) a description of each vehicle in the fleet, including the motor vehicle's model year, make, model, vehicle identification number, body style, gross weight, empty weight, and for a commercial vehicle, manufacturer's rated carrying capacity in tons;

(C) the existing license plate number, if any, assigned to each vehicle; and

(D) any other information that the department may require.

(2) The application must be accompanied by the following items:

(A) in the case of a leased vehicle, a copy of the lease agreement verifying that the vehicle is currently leased to the person to whom the fleet registration will be issued;

(B) registration fees prescribed by law;

(C) local fees or other fees prescribed by law and collected in conjunction with registering a vehicle;

(D) evidence of financial responsibility for each vehicle as required by Transportation Code, §502.153, unless otherwise exempted by law; and

(E) any other documents or fees required by law.

(d) Registration period.

(1) The department will designate a single registration period for a fleet so the registration period for each vehicle will expire on the same date.

(2) The fleet registration period will begin on the first day of a calendar month and end on the last day of a calendar month.

(e) Insignia.

(1) As evidence of registration, the department will issue distinguishing insignia for each vehicle in a fleet.

(2) The insignia shall be attached to the windshield of each vehicle as specified by Transportation Code, §502.180, if the vehicle has a windshield.

(3) The insignia shall be attached to the rear license plate if the vehicle has no windshield.

(4) The registration receipt for each vehicle shall at all times be carried in that vehicle and be available to law enforcement personnel.

(5) Insignia may not be transferred between vehicles, owners, or registrants.

(f) Fleet composition.

(1) A registrant may add a vehicle to a fleet at any time during the registration period. An added vehicle will be given the same registration period as the fleet and will be issued fleet registration insignia.

(2) A registrant may remove a vehicle from a fleet at any time during the registration period. The fleet registrant shall return the fleet registration insignia for that vehicle to the department at the time the vehicle is removed from the fleet.

(3) If the number of vehicles in a fleet falls below 25 during the registration period, fleet registration will remain in effect. If the number of vehicles in a fleet is below 25 at the end of the registration period, fleet registration may be canceled. In considering cancellation, the department will consider the number of remaining vehicles in the fleet, how long fleet registration has been in effect, and representations made by the registrant. In the event of cancellation, each vehicle shall be registered separately. The registrant shall immediately return all fleet registration insignia to the department.

(g) Fees.

(1) When a fleet is first established, the department will charge a registration fee for each vehicle for 12 months. A currently registered vehicle, however, will be given credit for any remaining time on its separate registration.

(2) When a vehicle is added to an existing fleet, the department will charge a registration fee that is prorated based on the number of months of fleet registration remaining. If the vehicle is currently registered, this fee will be adjusted to provide credit for the number of months of separate registration remaining. If the credit exceeds the prorated fleet registration fee, the registrant will receive the net credit for use at the time of registration renewal.

(3) When a vehicle is removed from fleet registration, it will be considered to be registered separately. The vehicle's separate registration will expire on the date that the fleet registration would have expired. The registrant must pay the statutory replacement fee to obtain regular registration insignia before the vehicle may be operated on a public highway.

This 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 July 26, 2002.

TRD-200204630
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: September 8, 2002
For further information, please call: (512) 463-8630

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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 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING SUBCHAPTER E. GENERAL REQUIREMENTS

10 TAC §80.136

The Texas Department of Housing and Community Affairs has withdrawn from consideration proposed new §80.136 which appeared in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2652).

Filed with the Office of the Secretary of State on July 29, 2002.

TRD-200204717
Bobbie Hill
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: July 29, 2002
For further information, please call: (512) 475-2206

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TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 411. STATE AUTHORITY RESPONSIBILITIES SUBCHAPTER B. INTERAGENCY AGREEMENTS

25 TAC §411.63

The Texas Department of Mental Health and Mental Retardation has withdrawn from consideration the proposed amendment to §411.63 which appeared in the February 8, 2002, issue of the *Texas Register* (27 TexReg 868).

Filed with the Office of the Secretary of State on July 23, 2002.

TRD-200204535
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: July 23, 2002
For further information, please call: (512) 206-5232

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CHAPTER 412. LOCAL AUTHORITY RESPONSIBILITIES SUBCHAPTER Z. JAIL DIVERSION PILOT PROGRAM

25 TAC §§412.951- 412.958

The Texas Department of Mental Health and Mental Retardation has withdrawn from consideration proposed new §§412.951-412.958 which appeared in the February 1, 2002 issue of the *Texas Register* (27 TexReg 677).

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204569
Andrew Hardin
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: July 24, 2002
For further information, please call: (512) 206-4516

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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 5. TEXAS BUILDING AND PROCUREMENT COMMISSION

CHAPTER 113. PROCUREMENT DIVISION
SUBCHAPTER A. PURCHASING

1 TAC §§113.1, 113.2, 113.4, 113.6, 113.8, 113.9, 113.19, 113.22

The Texas Building and Procurement Commission adopts amendments to 1 TAC §§113.1 (relating to Advisory Committees), 113.2 (relating to Definitions), 113.4 (relating to the Centralized Master Bidders List), 113.6 (relating to Bid Evaluation and Award), 113.8 (relating to Preferences), 113.9 (relating to Contract Administration), 113.19 (relating to Qualification of Information Systems Vendors) and new 1 TAC §113.22 (relating to Advisory Committees). The amendments to 1 TAC §§113.1, 113.2, 113.6, 113.8, 113.9, 113.19 and new §113.22 are adopted without changes to the proposed text as published in the May 31, 2002, issue of the *Texas Register* (27 TexReg 4656). The text will not be republished. The amendment to 1 TAC §113.4 is adopted with changes and will be republished.

The Texas Building and Procurement Commission adopts amended 1 TAC §113.1 and new 1 TAC §113.22 to comply with rulemaking and reporting requirements of the Texas Government Code, Chapter 2110. Amended 1 TAC §113.2 is adopted to establish additional common terms of reference for state agencies and local governmental entities to clarify language in 1 TAC §113.16--Multiple Award Contract Procedure and §113.17--Multiple Award Schedule. Amended 1 TAC §113.4 is adopted to add a new provision that will allow agencies to add vendors who are not on the Centralized Master Bidder's List (CMBL) to a final bid list for specific solicitations in order to increase competition. Amended 1 TAC §113.6 is adopted to expand the statutory reference of the Texas Government Code, §§2155.074, 2155.075, 2156.007, 2157.003 and 2157.125. Amended 1 TAC §113.8 is adopted to add two purchasing preferences pursuant to Texas Government Code, §2155.449 relating to a preference for goods and services from economically depressed or blighted areas; and a preference for goods produced in a formerly contaminated property for which the owner has a certificate of completion for voluntary cleanup pursuant to the Health and Safety Code, §361.609. Amended 1 TAC §113.9 is adopted to provide remedy, which can be asserted against a vendor who has failed to pay damages assessed by the state. The amendment is in accordance with Texas Government Code, §2155.070 and §2155.077. Amended 1 TAC §113.19 is adopted to update statutory citations (Texas Government Code, §§2157.062 - 2157.066) referenced in §113.19(d)(1) for requirements or criteria a vendor must meet in order to be designated as a Qualified Information Systems Vendors (QISV). Language has also been added to include the requirement found in Texas Government Code, §2157.066, that requires a vendor to make catalog information available on the worldwide web in order to be designated as a QISV.

The amendments to Chapter 113 will update language that is constant with requirements of the Texas Government Code specifically, §§2155.074, 2155.075, 2156.007, 2157.003, 2157.125, 2155.449 and 2157.062 - 2157.066. Additionally, the amendments to Chapter 113 will clarify procedures and guidelines and delete obsolete language in Chapter 113. New 1 TAC §113.22 will establish guidelines on advisory committees in accordance with Chapter 2110, of the Texas Government Code.

No comments were received regarding the adoption of the new and amended sections.

The new and amended sections are adopted under the authority §2152.003; Texas Government Code, Chapter 2155, Subchapter B--General Purchasing Requirements, Procedures and Programs, §2155,062; and Subchapter I--Multiple Award Contract Schedule, §§2155.501 - 2155.509, which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections. 1 TAC §113.4 is adopted under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2155.267, 2155.268, and 2155.269, which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections. 1 TAC §113.6 is adopted under the authority of the Texas Government Code, Title 10, Subtitle D, §§2152.003, 2155.074, 2155.075, 2156.007, 2157.003 and 2157.125, which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections. 1 TAC §113.8 is adopted under the authority of the Texas Government Code, Title 10, Subtitle D, §2152.003 and §2155.449 which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections. 1 TAC §113.9 is adopted under the authority of the Texas Government Code, §§2152.003, 2155.070 and 2155.077, which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections. 1 TAC §113.19 is adopted under the authority of the Texas Government Code, Title 10, Subtitle D, §2152.003 and §§2157.062 - 2157.066, which provides the

Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections. 1 TAC §113.1 and new 1 TAC §113.22 are adopted under the authority of the Texas Government Code, Title 10, Subtitle C, §§2110.005, 2110.006, 2110.007 and 2110.008; and Subtitle D, §§2152.003, 2155.080 and 2155.081, which provides the Texas Building and Procurement Commission with the authority to promulgate rules necessary to implement the sections.

§113.4. Centralized Master Bidders List.

(a) The commission maintains the Centralized Master Bidders List (CMBL) of the names and addresses of vendors which have registered for inclusion on the CMBL. The CMBL is maintained for the state's use in obtaining competitive bids for purchases and for registering vendors who wish to be designated as qualified information systems vendors. Bid invitations and requests for proposals shall be transmitted to vendors on the CMBL for the solicited commodity and/or service designated by the vendor for open market, term contracts, competitive sealed proposal acquisitions and delegated purchases in excess of the non-competitive bid limit.

(b) Registration for the Centralized Master Bidders List is an on line process with a vendor managed web based system. The established fee is to be paid annually.

(c) It is the vendor's responsibility to maintain their CMBL profile to ensure correct information for receipt of bids based on products or services which can be provided for selected districts for the State of Texas.

(d) A vendor may be administratively removed from the CMBL for one or more of the following reasons:

(1) failing to pay or unnecessarily delaying payment of damages assessed by the commission;

(2) failing to remit the annual CMBL fee; or

(3) any factor set forth in Government Code, Chapter 2155.

(e) A vendor which has been removed from the CMBL shall not be reinstated until expiration of the period for which the vendor was removed and approval is granted.

(f) An error in addressing a bid invitation or request for proposal or a failure of the post office to deliver the solicitation will not be sufficient reason to require the commission to reject all other bids or proposals.

(g) State agencies shall use the CMBL to select bidders for competitive bids or proposals and to the fullest extent possible for purchases exempt from the commission's purchasing authority. This requirement does not apply to the Texas Department of Transportation or to an institution of higher education as defined by §61.003, Education Code, but an institution of higher education should use the CMBL when possible.

(h) As set forth in Texas Government Code, §2155.269, state agencies may waive the requirement to solicit only from bidders listed on the Centralized Master Bidders List (CMBL) by obtaining approval from the agency head or designee to add non-CMBL bidders to the final bid list. Non-CMBL bidders can be added to the final bid list for specific solicitations where the requirement to solicit only CMBL bidders is not warranted, such as to increase competition. This does not apply to purchases in §113.19 of this title (relating to Qualification of Information Systems Vendors (QISV))

This agency 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 July 23, 2002.

TRD-200204534
Juliet U. King
Legal Counsel
Texas Building and Procurement Commission
Effective date: August 12, 2002
Proposal publication date: May 31, 2002
For further information, please call: (512) 463-3583

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts amendments to §§80.11, 80.52, 80.54, 80.55, 80.119, 80.123, 80.204, and 80.205 with changes to the proposed rules as published in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2642). The text will be republished. The Department adopts new §80.124, and amendments to §§80.20, 80.51, 80.56, 80.62, 80.63, 80.66, 80.121, 80.122, 80.128, 80.130, 80.132, 80.135, 80.180, 80.202, 80.207, and 80.208 without changes to the proposed rules as published in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2642). The text will not be republished.

The effective date of rules relating to installation standards (§§80.51, 80.52, 80.54, 80.55, 80.56, 80.62, 80.63, and 80.119) are effective 60 days following the date of publication with the *Texas Register* of notice that the rule has been adopted. All other rules are effective 30 days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

The Department received 104 comments regarding the proposal. Of these, 38 were written comments and 66 were received orally in a public hearing held on May 20, 2002. The majority of comments, written and oral, totaling 98 of the comments received, were directed to the need to adopt rules clarifying the continuing ability of homeowners to choose between financing the purchase of a manufactured home as a chattel or as real property. The testimony received, written and oral, included testimony from legislators who publicly stated that in voting for House Bill 1869 (77th Legislative Session) it was never their intent to eliminate the option of a chattel loan on a manufactured home.

Except as noted below, the rules as proposed on April 5, 2002 are adopted as final rules with the following non-substantive changes.

Section 80.11(43) (formerly §80.11(33))--The proposed changes are not adopted. The terminology used in different sections of the Standards Act contains meaningful distinctions which need to be preserved.

Section 80.52(a)(7)--The proposed changes are not adopted. It is believed that the section, as it already exists, accurately describes the legal requirement and the additional language could have the unintended consequence of limiting installations to fully enclosed foundations.

Section 80.54(b)(2)(A)--The proposed text is adopted, but moved to paragraph (2) because §80.54(b)(2)(B) is not adopted.

Section 80.54(b)(2)(B)--The proposed changes are not adopted. It is believed that the additional language could have the unintended consequence of limiting installations to fully enclosed foundations.

Section 80.55(b)(1)--In the first sentence the measurement format was corrected to read 1.25 inches.

Section 80.55(f)(6)(C)--Add the sentence "A strap must be within 3 inches of where the cross member attaches to the main I-beam." This sentence was taken out of the Longitudinal Ties drawing, but is being re-inserted in this subparagraph for clarity.

Section 80.119(g)(6)--To be consistent with the rules, the reference "TMHSA" was amended to "Standards Act."

Section 80.119(h)--To be consistent with the rules, the word "ten" was inserted before the numeric number.

Section 80.123(j)(1)--To be consistent with the rules, the words ninety, thirty, and fifteen were inserted before the numeric numbers.

Section 80.136--The proposed new section is withdrawn.

Section 80.204(d)(1)--The term "attachment to" is replaced with "being" to avoid confusion over the term "attachment."

Section 80.204(f)(3)--The Department is withdrawing proposed paragraph (3) because statutory disclosure requirements are self-explanatory.

Section 80.205(c)(3)(B)--The proposed changes are adopted with the following non-substantive changes: the words "and chief executive office address" are replaced with the words "sales location address and license number" because this information will achieve the same result, identifying the office involved, while utilizing information that will reduce any ambiguity or confusion as to the affected licensee.

Responses to comments on proposed rules:

Comments on the general issue of the availability of chattel lending on manufactured homes

The majority of the comments focused on the effect of House Bill 1869 with respect to ability of lenders to finance manufactured home sales with chattel loans. A total of 104 parties provided written and oral testimony on this subject. Of the parties commenting, 3 expressed support for the proposition that chattel loans should be eliminated, and 98 expressed support for the adoption of rules which would facilitate the continued making of chattel loans. One commenter expressed support for the elimination of chattel lending on manufactured homes. Several legislators testified or provided letters and stated that it had not been their intent, in supporting the adoption of House Bill 1869, to eliminate the ability of Texans to choose whether to finance the acquisition of a manufactured home as real property or as a chattel. Two of these legislators provided suggested language to accommodate the ability to make this choice. However, because the language addressed issues outside the scope of the proposed rules, it is not addressed herein. The Department has under consideration the issue of whether to propose additional rules regarding this issue and, if so, how to approach the matter.

Because of the various sections in the proposed rules, §80.136 was the section which dealt most directly with the issue of how a manufactured home would be classified, i.e., as real or personal property, there were a number of comments on aspects of that section. Although these comments are discussed below in order to continue the dialogue, §80.136 is being withdrawn in its entirety. The primary reason for withdrawing the proposed section relates to the fact that as proposed it related only to financed transactions, but commenters were raising issues about the way that it applied to questions of titling and classification in general. The way that titling and classification issues were to be treated in the context of financed transactions could not alter the scope and effect of House Bill 1869 as it might apply to cash transactions. The Department will consider re-proposing the section at a later date.

One commenter, commenting on behalf of a trade association representing approximately 600 financial institutions, asked that the Department clarify the meaning of a manufactured home's being "secured" to a permanent foundation. It was suggested that the definition of "secured" simply cross reference the definition of "permanently affixed." The commenter indicated that if a home is not permanently affixed to the real property on which it is situated, it is not real property. The proposed amendment to renumbered §80.11(43), formerly (33), is also being withdrawn so that the Department may reconsider the meanings of the terms affixed, attached, installed, and secured and issue a proposed definition or definitions that give effect to any differing nuances of meaning. In that regard, it is noted that all of these terms were used in different portions of House Bill 1869.

One commenter requested clarification as to what exactly was meant by proposed §80.136(b)(1). Specifically, if A owns a manufactured home and it is placed on real property owned by A and B, is it on real property owned by the same person and, therefore, also presumed to be real property (if attached)? It is the view of the Department that "same" means identical and "A" is not the "same" as "A and B." We see no need to define further a word which is already well-defined. This same commenter went on to ask if the nature of the land or the use of the home made a difference. For example, if it made a difference that A placed A's home on A's land but it was a very large tract with multiple uses or A's home on A's land would be for use by an employee or family member of A. The size of the parcel of real estate and the use of the manufactured home do not, in our estimation, have any bearing on how the home is to be titled and classified.

The same commenter questioned how §80.136(a) and (b) would be reconciled on the issue of treatment of cash sales. Given that §80.136, by its terms, applies only to financed transactions, we do not see the inconsistency. It appears that the reader is trying to draw a conclusion that in some way §80.136(b) would result in the titling of a manufactured home would be handled differently depending on whether it was a cash sale or a financed sale. Because the issues treated in this section are some of the most controversial issues under House Bill 1869 it is understandable that readers would be focusing on this language to see if it provided a "loophole" in the statute. That is not and cannot be the case. The rules must be consistent with the statute pursuant to which they are enacted.

Another commenter submitted that there should be no reason to require that the closing of a cash sale occur at one of the designated locations (attorney, title company, or federally insured financial institution) because this would needlessly increase consumers' costs. The statute does not permit any such exceptions. All sales of manufactured homes that constitute real property under §19 of the Standards Act must close at one of these designated locations, without exception.

Two of the legislators testified that in supporting the enactment of House Bill 1869 they never intended to eliminate the chattel mortgage have provided suggested language for inclusion in a rule.

This language focuses on the fact that different terminology is used when referring to classification as real estate for purposes of assessing and collecting ad valorem taxes ("attached," which is defined in §19A of the Standards Act) and "affixed" and "become(s) an improvement," which are not defined. The suggested language draws distinctions between these terms that would, if put into effect, enable a manufactured home to be classified, assessed, and taxed as real property while being characterized for other purposes, such as the granting of a security interest to secure repayment of a loan, as either a chattel or as real property, depending on a number of factors.

Comments on other specific sections in the proposed rules

Section 80.11(54)--One commenter expressed support for the proposed revision.

Section 80.20--One commenter asked for the justification for the proposed increase in fees.

The Department has not revised its licensing fees since 1987. During that time, the costs of the Department have increased, not just in licensing but also in titling, enforcement, and other areas. These fees, as increased, are in line with fees for similar licenses and are designed to enable the Department to continue to conduct its licensing, titling, and oversight functions on a fiscally responsible basis.

Inspection fees do not cover the Department's calculated costs for conducting inspections. The changes brought about by the enactment of House Bill 1869 will place additional work on the Department to review the design, installation, and utilization of permanent foundations.

The Department believes that the proposed fees are an equitable way of spreading some of the costs of carrying out its responsibilities.

Section 80.52(a)(7)--One commenter asked why the proposed rule would require the use of a Texas engineer, noting that many manufacturers have their own engineers who are not licensed in Texas. The use of out-of-state engineers will continue to be permitted only when the activities are part of a DAPIA function. The Department believes that utilizing an engineer to approve foundation-related matters for a Texas site should, unless federal law, in connection with a DAPIA-related function, permits otherwise, be performed by Texas engineers. Another commenter asked that the proposed new language in this section and the similar language in §80.54(b)(2)(B) be deleted. The rationale for this request was that it would effectively require that all foundations be skirted, which would have been an unintended result. Accordingly, the proposed language will not be incorporated in the rules, as adopted.

Section 80.55(f)(6)--One commenter opposed the requirement for the spacing of tie-down straps on Wind Zone II homes, citing problems with the distances from windows and doors. While the Department understands the issues that spacing presents, no change will be made. When anchors are placed more closely than four feet and an anchor pulls out, the cone of earth it affects could adversely affect the adjacent anchors. Requiring this spacing will minimize this problem.

Section 80.119(g)(2)--One commenter asked if the Department were approved to perform FHA inspections. It is not and does not believe it should pursue such approval.

Section 80.121(c)--One commenter expressed support for the proposed revision.

Section 80.124--One commenter asked for additional clarification to be added, delineating when money received by a retailer is a down payment and when it is a deposit. The Department believes that the definitional distinctions that have been made are adequate. No further clarification on this point is believed to be warranted.

Section 80.124(d)(1)--One commenter asked that the proposed rule be revised to provide examples of areas that could be covered by representations, stating that they were not all-inclusive, and providing that the required notice be given again prior to any agreed alteration of the representations. The Department does not believe that such examples will be useful. The provision applies to all representations regarding the home. Re-disclosing in the event of agreed alterations does not appear to be required by or provided for by the statute.

Section 80.124(d)(3)--One commenter asked that retailers be required, when conducting a transaction in a language other than English, to provide translated notices, using the language employed for the transaction. The commenter referred to the Texas Constitution, Article 16, §50(g), as the model for the request. The commenter asked for a similar change in proposed §80.136(f)(5). While these suggestions may have merit, the Department does not believe that a constitutional requirement applicable to a wholly different type of transaction is justification for adopting such a requirement. The relevant statutes do not appear to provide for imposing such a requirement on the industry.

Section 80.124(f)--One commenter asked that the proposed rule be revised to make it explicit that a down payment may not be collected prior to the execution of a retail installment contract. The Department does not believe that this is supported by the statute. In fact, the statute specifically excepts from the provisions regarding refunding of deposits the situation where a down payment is placed in escrow in a real estate transaction.

Section 80.132(2)(C) and (D)--One commenter opposed doubling the time to respond to inspection requests. The period provided for, 30 days, is as provided for by statute.

Section 80.180(b)(1)--One commenter opposed these changes. Specifically, the comment read as follows: "We oppose the changes in this section. We believe there has been an error in moving the substance of this section to the new section §80.124. Whereas the current language applies to all deposit transactions, the new language only applies to special order homes. Also, by keeping the language in this section, the failure to deliver the "Important Health Notice" is kept a non-conformance with the rules subject to action by the Department. It is not clear in the new language whether failure to deliver the notice is actionable by the Department or merely results in the ability of the consumer to retrieve their deposit." The Department believes that a violation of the rules is clear grounds for an administrative action, and this is an adequate basis for enforcement. The concept of an event giving rise to a right of refund is adequately defined in the law.

Section 80.202--One commenter expressed opposition to the proposed revision but offered no specifics. Another commenter requested justification for the proposed fee increases.

The Department has not revised its licensing fees since 1987. During that time, the costs of the Department have increased, not just in licensing but also in titling, enforcement, and other areas. These fees, as increased, are in line with fees for similar licenses and are designed to enable the Department to continue

to conduct its licensing, titling, and oversight functions on a fiscally responsible basis.

Inspection fees do not cover the Department's calculated costs for conducting inspections. The changes brought about by the enactment of House Bill 1869 will place additional work on the Department to review the design, installation, and utilization of permanent foundations.

The Department believes that the proposed fees are an equitable way of spreading some of the costs of carrying out its responsibilities.

Section 80.204--One commenter expressed opposition to the proposed revision but offered no specifics.

Section 80.204(f)--One commenter proposed revising the language to conform more closely to the language of the statute. The Department is withdrawing proposed paragraph (3) because statutory disclosure requirements are self-explanatory.

Section 80.208--One commenter expressed opposition to the proposed revision but offered no specifics.

The following is a restatement of the rules' factual bases:

Section 80.11 is adopted *(with changes)* to add new definitions and revise existing definitions related to manufactured housing.

Section §80.20 is adopted *(without changes)* to provide clarification of required fees for installation reports, seals, education fee, reinspection of consumer's home and habitability inspections.

Section §80.51 is adopted *(without changes)* because a provision was needed for manufacturers to file their installation manuals electronically, if they desired, and a sentence was reworded so that an installer will not mistakenly believe that an engineer could approve a wind zone I home, built after September 1, 1997, for installation in a wind zone II county.

Section 80.52 is adopted *(with changes)*. Amended §80.52(b) to clarifying if a certification will be by the homeowner only, the certification must show compliance with local ordinances if applicable. This rule will help avoid the cancellation of home titles for homes installed with conditional use zoning permits. Lenders may know this requirement, but a consumer probably does not.

Section §80.54 is adopted *(with changes)* to clarify standards for installation of manufactured homes. The site preparation responsibilities are amended in §80.54(b) because the responsibility for site preparation and proper drainage will differ depending on specific circumstances. For example, when a consumer contracts to have the home installed on a lot owned by the consumer, the consumer has the site preparation and drainage responsibility; however, the retailer will be responsible if the home is installed before it is sold. Also, §80.54(b) is amended to allow installers to follow instructions for the home, specifications of an approved stabilization system, or the generic standards. §80.54(d)(6) is amended to decrease the required size of shims from at least 4-inches to a minimum of 3-inches because several shim producers reported that they do not make a 3.5 or 4-inch wide shim.

Figure: 10 TAC §80.54(d)(4) is adopted *(without changes)*. Notation number 5 is added to Table 3A referencing the correct American Society for Testing and Materials (ASTM) standard and defines actual block dimensions that are 3/8 inch less than the nominal dimensions.

Figure: 10 TAC §80.54(d)(6) is adopted *(without changes)*. Notation number 1 and 2 are revised because inspectors need a reference to cite after observing damaged support system components. The specifications in Pier A are updated because the present wording is incorrect and conflicts with the drawing. Plate size is updated in Pier A and B drawings because installers need another plate size to make up a pier height.

Figure: 10 TAC §80.54(d)(6)(C) is adopted *(without changes)*. Updated number 1 in the notation section in Figure 3C because installers need a method when the front face of the perimeter pier is flush with the perimeter joist.

Section 80.55 is adopted *(with changes)*. The rule is amended for inspectors to have a way to identify conforming tie-down straps when inspecting the installation of manufactured homes. §80.55(d) is amended for installers to have a standard for the number of longitudinal ties per end when cross-drive rock anchors are used in difficult soil. §80.55(e) is amended to correct an inaccurate reference relating to standards for the installation of manufactured homes. §80.55(f) is amended to more clearly describe the requirements for longitudinal ties.

Figure: 10 TAC §80.55(c)(2) is adopted *(without changes)*. Updated number 1 in the notation section regarding placement of stabilizing plates because the illustration does not describe the diameter of the concrete collar.

Figure: 10 TAC §80.55(d)(2) is adopted *(without changes)*. Increased the maximum vertical distance in the wind zone I table up to a pier height of 80 inches and revised numbers 1 through 9 in the notation section for clarity.

Figure: 10 TAC §80.55(d)(3) is adopted *(without changes)*. The revisions are non-substantive (only changed the formatting).

Figure: 10 TAC §80.55(e)(1) is adopted *(without changes)*. Revised Table 5a concerning the maximum spacing for diagonal ties per side of the assembled unit by increasing the maximum vertical distance in the table up to a pier height of 80 inches and revised numbers 1 through 9 in the notation section for clarity.

Figure: 10 TAC §80.55(f)(4) is adopted *(without changes)*. The revisions are non-substantive (only changed the formatting).

Figure: 10 TAC §80.55(f)(6)(D) is adopted *(without changes)*. Revised figure 1 and 2 notations in the longitudinal ties drawing for clarify.

Section 80.56 is adopted *(without changes)*. Amended §80.56(a) to clarify the types of material that are appropriate air and water infiltration barriers. Amended §80.56(d) to correct inaccurate references in paragraphs (1) and (4).

Figure: 10 TAC §80.56(a)(4) is adopted *(without changes)*. Relocated drawing from §80.56(a)(3) and made non-substantive revisions (only changed the formatting).

Figure: 10 TAC §80.56(c)(2) is adopted *(without changes)*. Revised the text in the endwall connections drawing for clarity.

Figure: 10 TAC §80.56(d)(4) is adopted *(without changes)*. The current reference is incorrect in the roof connection drawing.

Figure: 10 TAC §80.56(h)(1) is adopted *(without changes)*. The revisions are non-substantive (only changed the formatting).

Section 80.62 is adopted *(without changes)*. Amended §80.62(a) to explain that we will accept certification reports that are smaller than 8.5 by 11 inches. Amended §80.62(d) and (e) to clarify wording and revised referenced codes.

Section 80.63 is adopted *(without changes)*. Amended §80.63(c) to include preservative treated wood components as approved

materials as long as they conform to standards set by the American Wood Preserver's Association. Amended §80.63(e) to update the publication reference that sets standards for certain types of stabilizing systems.

Section 80.66(e) is adopted *(without changes)* to explain that a damaged home may be refurbished to its original structural configuration, if not damaged enough to be declared salvage.

Section 80.119 is adopted *(with changes)*. Amended §80.119(c) to reflect the updated cite referenced in the Standards Act. Amended §80.119(f) to delete the procedures for the obsolete Installation Report (Form T) and add a procedure for the Notice of Installation Affidavit. Amended §80.119(g) to describe the procedures when the installer selects the Department, a local government, or other inspectors to inspect the permanent foundation before concealment. Amended §80.119(h) to describe the procedure when the installer installs a manufactured home as personal property on land not owned by the consumer.

Section 80.121 is adopted *(without changes)*. Amended §80.121(a) to require the retailer to at least summarize the contents of the warranties to the consumer before the contract or binding agreement is signed. Amended §80.121(a) and (b) to describe the retailer record keeping responsibilities. Amended §80.121(c) so that the Department may prosecute retailers who knowingly sell new or used manufactured homes to consumers in unsuitable zones.

Section 80.122(a) is adopted *(without changes)* to expound on security requirements that are also mentioned in the Standards Act.

Section 80.123 is adopted *(with changes)*. Amended §80.123(a) through (c) to add the requirement to identify the corporate business name and corporate structure. Amended §80.123(d) because the rebuilders are considered licensed instead of certified. Amended §80.123(e) to require Articles of Incorporation or Assumed Name Certificate and correct a section reference. Amended §80.123(f) to limit the time that a temporary installer's license is valid to 30 calendar days and to allow a homeowner to install their homes by the generic installation standards. Amended §80.123(g) to clarify the requirements for a salesperson's license, identifies who may act as a salesperson and allows the Department to track the salespersons that change their employer. Amended §80.123(h) to prevent a duplicate license. Amended §80.123(j) to outline the requirements for a nonprofit educational institution or foundation to be approved for conducting a training program as sanctioned by the Standards Act, §7(q). Section 80.123(k) is added because a non-compliance history is an important factor in determining whether to deny, suspend or revoke a license. Amended §80.123(k) to prevent license renewals from being in a pending status indefinitely. Amended §80.123(n) to delete information that is no longer necessary.

New §80.124 is adopted *(without changes)* to detail requirements for retaining deposits and down payments. The new rule is necessary to prevent improper deposit and down payment practices.

Section 80.128 is adopted *(without changes)*. Section 80.128(a)(4) was amended to fully define Department.

Section 80.130(a) through (c) is adopted *(without changes)* to describe in more understandable terminology the requirements for delivery of warranty.

Section 80.132 is adopted *(without changes)* to comply with current consumer complaint requirements in the Standards Act and the Federal Manufactured Home Procedural and Enforcement Regulations concerning procedures for handling consumer complaints.

Section 80.135(a) is adopted *(without changes)* to clarify that a salvaged home or a home that is not habitable may not be auctioned to a consumer as a dwelling.

New §80.136 is withdrawn.

Section 80.180(b)(1) is adopted *(without changes)* regarding the formaldehyde notice requirements to delete information that is covered in new §80.124 (relating to Deposits and Down Payments).

Section 80.202 is adopted *(without changes)*. Amended §80.202(a) to clarify that there is a fee for reissuance of a certificate of attachment and that cancellations and quick titles are separate processes. Cancellations involve a unique process that cannot be accomplished within the quick title timeframe. Therefore, we need to require that quick title applications arrive by overnight mail or delivered in-person because it is impossible to ferret out the quick title applications when submitted by regular mail. Amended §80.202(b) to add that a fee of $35 is required for reissuance of a certificate of attachment. Amended §80.202(c) to add that the Department will accept company or business firm checks in payment of the fee for issuance of a license. Amended §80.202(d) to omit the fee amount of $35 because the fee could be different.

Section 80.204 is adopted *(with changes)*. Amended §80.204(b) to lessen the restriction that may have caused the Department to reject more title applications for lack of completeness than necessary. Amended §80.204(b)(5) describing the right of survivorship is deleted because it is outlined in the Standards Act. Amended §80.204(b)(6) explaining that the fees will also be submitted along with the application to the Austin headquarters for processing. Amended §80.204(c) to require that a map be included in the installation information furnished to the Department. Amended §80.204(d) describing the information found on a document of title, is amended to omit the space available for the signature of the purchaser because the title is no longer transferable in this manner.

Section 80.205 is adopted *(with changes)*. Amended §80.205(c) to clarify filing of the inventory-finance security form. Amended §80.205(d) because the Department can consider other documents for release of lien other than Form B (Release of Lien or Foreclosure of Lien). Amended §80.205(g) to clarify right of survivorship.

Section 80.207(a) is adopted *(without changes)* to clarify when a canceled document of title may be reinstated.

Section 80.208(b) and (c) are adopted *(without changes)* because the four-part form format is no longer used for recording tax liens. The updated format coincides with the Standards Act.

SUBCHAPTER B. DEFINITIONS

10 TAC §80.11

The amended section is adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as

necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted amendments.

§80.11. Definitions.

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

(1) Alteration--The replacement, addition, and modification or removal of any equipment or its installation after sale by the manufacturer to a retailer, but prior to sale and installation to a purchaser which may affect the construction, fire safety, occupancy plumbing, heat-producing, or electrical system. An alteration is deemed to be prior to sale if the alteration is part of the retail sales contract. It includes any modification made in the manufactured home which may affect the compliance of the home with the standards, but it does not include the repair or replacement of a component or appliance requiring plug-in to an electrical receptacle where the replaced item is of the same configuration and rating as the one being replaced. It also does not include the addition of an appliance requiring "plug-in" to an electrical receptacle, which appliance was not provided with the manufactured home by the manufacturer, if the rating of the appliance does not exceed the rating of the receptacle to which it is connected (FMHCSS §3287.7(c)).

(2) Anchoring components--Any component which is attached to the manufactured home and is designed to resist the horizontal and vertical forces imposed on the manufactured home as a result of wind loading. These components include auger anchors, rock anchors, slab anchors, ground anchors, stabilizing plates, connection bolts, j-hooks, buckles, and split bolts.

(3) Anchoring equipment--Straps, cables, turnbuckles, and chains, including tensioning devices, which are used with ties to secure a manufactured home to anchoring components or other approved devices.

(4) Anchoring systems--Combination of ties, anchoring components, and anchoring equipment that will resist overturning and lateral movement of the manufactured home from wind forces.

(5) APA--Administrative Procedure Act, Texas Government Code, Chapter 2001.

(6) Board--Governing Board of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs.

(7) Business use--Any use other than for dwelling purposes.

(8) Calendar days--Includes every day on the calendar.

(9) Certificate of Attachment--A certificate issued by the department to the person who surrenders the Manufacturer's Certificate of Origin or document of title when the home has been permanently affixed to real estate.

(10) Coastline--The shoreline that forms the boundary between the land and the Gulf of Mexico or a bay or estuary connecting to the Gulf of Mexico that is more than five miles wide.

(11) Covenant Disclosure Notice Affidavit--Disclosure to consumer by retailer and lender required pursuant to §21 of the Standards Act.

(12) Credit document--The credit sale contract or the loan instruments including all the written agreements between the consumer and creditor that relate to the credit transaction.

(13) Creditor--A person involved in a credit transaction who:

(A) extends or arranges the extension of credit; or

(B) is a retailer or broker as defined in the Standards Act and participates in arranging for the extension of credit.

(14) Creditor-Lender--A person that is involved in extending or arranging for credit in inventory financing secured by manufactured housing.

(15) Custom designed stabilization system--An anchoring and support system that is not an approved method as prescribed by the state generic standards, manufacturer's installation instructions, or other systems pre-approved by the department.

(16) DAPIA--The Design Approval Primary Inspection Agency.

(17) Defect--A failure to comply with an applicable federal manufactured home safety and construction standard that renders the manufactured home or any part or component thereof not fit for the ordinary use for which it was intended, but does not result in an unreasonable risk of injury or death to occupants of the affected manufactured home (FMHCSS §3282.7(j)).

(18) Department--The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA).

(19) Department inspector--An inspector who is an employee of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs or an inspector who is an employee of an entity performing inspection services under contract with the department.

(20) Deposits--Money or other consideration given by a consumer to a retailer, salesperson, or agent of a retailer to hold a home in inventory for subsequent purchase or to special order a home for subsequent purchase.

(21) Diagonal tie--A tie intended to primarily resist horizontal forces, but which may also be used to resist vertical forces.

(22) Director--The Executive Director of the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (TDHCA).

(23) Document of Title--The instrument issued by the department to reflect the ownership of a manufactured home and any liens on such home as provided by the records of the department.

(24) Down Payment--An amount, including the value of any property used as a trade-in, paid to a retailer to reduce the cash price of goods or services purchased in a credit sale transaction.

(25) Dwelling unit--One or more habitable rooms which are designed to be occupied by one family with facilities for living, sleeping, cooking and eating.

(26) FMHCSS--Federal Manufactured Home Construction and Safety Standards that implement the National Manufactured Home Construction and Safety Standards Act of 1974, 42 USC 5401, et seq., and means a reasonable standard for the construction, design, and performance of a manufactured home which meets the needs of the public including the need for quality, durability, and safety.

(27) Footing--That portion of the support system that transmits loads directly to the soil.

(28) Ground anchor--Any device at the manufactured home site designed to transfer manufactured home anchoring loads to the ground.

(29) HUD-Code manufactured home--A structure constructed on or after June 15, 1976, according to the rules of HUD, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems. The term does not include a recreational vehicle as that term is defined by 24 CFR, §3282.8(g).

(30) Imminent safety hazard--A hazard that presents an imminent and unreasonable risk of death or severe personal injury that may or may not be related to failure to comply with an applicable federal manufactured home construction and safety standard (FMHCSS §3282.7(q)).

(31) Independent testing laboratory--An agency or firm that tests products for conformance to standards and employs at least one engineer or architect licensed in at least one state.

(32) Installation information--A term used to describe the reports used to inform the department of information needed to perform installation inspections (includes Notice of Installation Affidavit).

(33) IPIA--The Production Inspection Primary Inspection Agency which evaluates the ability of manufactured home manufacturing plants to follow approved quality control procedures and/or provides ongoing surveillance of the manufacturing process.

(34) Lien--A security interest that is created by any kind of lease, conditional sales contract, deed of trust, chattel mortgage, trust receipt, reservation of title or other security agreement of whatever kind or character, if an interest, other than an absolute title, is sought to be held or given in a manufactured home, and any lien on a manufactured home that is created or given by the constitution or a statute.

(35) Main frame--The structural components on which the body of the manufactured home is mounted.

(36) Manufactured home--A HUD-Code manufactured home or a mobile home and collectively means and refers to both.

(37) Manufactured home identification numbers--For purposes of title records, the numbers shall include the HUD label number(s) and the serial number(s) imprinted or stamped on the home in accordance with HUD departmental regulations. For homes manufactured prior to June 15, 1976, the Texas seal number, as issued by the department, shall be used instead of the HUD label number. If a home manufactured prior to June 15, 1976, does not have a Texas seal, or if a home manufactured after June 15, 1976, does not have a HUD label, a Texas seal shall be purchased from the department and attached to the home and used for identification in lieu of the HUD label number.

(38) Manufactured home site--That area of a lot or tract of land on which a manufactured home is installed.

(39) Mobile home--A structure that was constructed before June 15, 1976, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems.

(40) Notice of Attachment--Notice as defined in §19(l) of the Standards Act that may be filed in property records of the county in which the home is located by a person before department can issue Certificate of Attachment when home is affixed or becomes an improvement to real estate.

(41) Notice of Improvement Attachment--Notice as defined in §19(l) of the Standards Act that must be filed in property records of the county in which the home is located by a title insurance company before department can issue Certificate of Attachment when home is affixed or becomes an improvement to real estate.

(42) Permanent foundation--A system of supports and securements, including piers, either partially or entirely below grade which is constructed or certified in accordance with the criteria outlined in §80.52(a) and (b), of this title (relating to Permanent Foundation Performance Criteria).

(43) Permanently affixed--Having been anchored to the real estate by attachment to a permanent foundation.

(44) Rebuild--To make a salvaged manufactured home habitable in accordance with §80.66 of this title (relating to Rebuilding or Repairing a "Salvaged" Manufactured Home).

(45) Rebuilder--Any person, within the state, who has been licensed by the department to rebuild a salvaged manufactured home, as defined in §8(g) of the Standards Act, in accordance with the rules and regulations of the department.

(46) Refurbish--To make a nonhabitable manufactured home or section habitable by repairing, adding, replacing, modifying, or removing components.

(47) Serious defect--Any failure to comply with an applicable federal manufactured home construction and safety standard that renders the manufactured home or any part thereof not fit for the ordinary use for which it was intended and which results in an unreasonable risk of injury or death to occupants of the affected manufactured home (FMHCSS §3282.7(gg)).

(48) Shim--A wedge-shaped piece of cedar, oak, walnut, pecan, gum, ash, hickory, elm, or other comparable hardwood or other accepted material not to exceed one (1) inch vertical (actual) height.

(49) Stabilizing components--All components of the anchoring and support system such as piers, footings, ties, anchoring equipment, ground anchors, and any other equipment which supports the manufactured home and secures it to the ground.

(50) Standards Act--Texas Manufactured Housing Standards Act, Texas Revised Civil Statutes, Article 5221f.

(51) Support system--A combination of footings, piers, caps and shims that support the manufactured home.

(52) TDHCA--The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department).

(53) TMHSA--Texas Manufactured Housing Standards Act, Texas Revised Civil Statutes, Article 5221f.

(54) Used home--Any manufactured home (or mobile home) for which a document of title has previously been issued by an appropriate agency of any state or which has been occupied.

(55) Vertical tie--A tie intended to primarily resist the uplifting and overturning forces.

(56) Wind Zone I--All Texas counties not in Wind Zone II.

(57) Wind Zone II--Aransas, Brazoria, Calhoun, Cameron, Chambers, Galveston, Jefferson, Kenedy, Kleberg, Matagorda, Nueces, Orange, Refugio, San Patricio, and Willacy counties.

(58) Working days--Includes every day on the calendar except Saturday, Sunday, and federal and state 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 C. FEE STRUCTURE

10 TAC §80.20

The amended section is adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted amendments.

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SUBCHAPTER D. STANDARDS AND REQUIREMENTS

10 TAC §§80.51, 80.52, 80.54 - 80.56, 80.62, 80.63

The amended sections are adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted amendments.

§80.52. Permanent Foundation Criteria.

(a) The permanent foundation system shall be either:

(1) capable of transferring all design loads imposed by or upon the structure into soil or bedrock without failure;

(2) placed at an adequate depth below grade to prevent structural damage from frost heave;

(3) constructed of concrete, metal, treated lumber or wood, masonry, or other materials conforming to nationally recognized standards;

(4) designed so that all of the components of the foundation system cannot be easily removed from the site and used at any other location and the drawings state that the foundation is a permanent foundation for a manufactured home;

(5) designed so that the attached structure resists overturning due to wind pressure by the dead load resisting moment of the structure and foundation. The weight of earth superimposed over footings may be used to calculate the dead load resisting moment. The overturning moment shall not exceed the dead load resisting moment and the overturning moment, multiplied by a safety factor of 1.5, shall be less than or equal to the dead load stabilizing moment plus the stabilizing moment due to ground anchor reactions;

(6) designed to have the structure attached without the towing hitch, axles, brakes, wheels and other parts of the chassis that operate only during transportation; and

(7) designed in accordance with accepted engineering practice to resist damage due to decay, insects, and condensation. A Texas licensed engineer or architect shall stamp and sign each foundation drawing. If the foundation drawing is approved by the DAPIA, the engineer or architect may be licensed in another state; or

(b) In the alternative for a home acquired and installed before January 1, 2002, a permanent foundation is a system which is certified by the consumer/mortgagor and the lender/mortgagee in a real estate loan transaction, or certified by the owner if there is no lien or the lien has been released, as having permanently affixed the structure to the real estate. If the certification is by the owner only, the certification must show compliance with local ordinances if applicable.

§80.54. Standards for the Installation of Manufactured Homes.

(a) All manufactured homes shall be installed in accordance with one of the following:

(1) the home manufacturer's installation instructions;

(2) the state's generic standards set forth in this section, §80.55 of this title (relating to Anchoring Systems), §80.56 of this title (relating to Multi-Section Connection Standards), and modified by any appendix filed in accordance with §80.51(a)(2) of this title (relating to Manufactured Home Installation Requirements);

(3) a custom designed stabilization system;

(4) a stabilization system pre-approved by the department; or

(5) on a permanent foundation.

(b) Site Preparation Responsibilities and Requirements:

(1) The purchaser is responsible for the proper preparation of the site where the manufactured home (new or used) is to be installed unless the home is installed in a rental community. Except in rental communities, the purchaser shall remove all debris, sod, tree stumps and other organic materials from all areas where footings are to be located. In areas where footings are not to be located, all debris, sod,

tree stumps and other organic material shall be trimmed, cut, or removed down to a maximum height of 8 inches above the ground. The retailer must give the purchaser a site preparation notice as described in this section prior to the execution of any binding sales agreement, if the sales agreement will be executed before the home is installed. If the installation is a secondary move, not involving a retail sale, the installer must give the homeowner the site preparation notice prior to any agreement for the secondary installation of the home.

(2) If the retailer or installer provides the materials for skirting or contracts for the installation of skirting, the retailer or installer is responsible for the following: The retailer or installer shall install any required moisture and ground vapor control measures in accordance with the home installation instructions, specifications of an approved stabilization system, or the generic standards and shall provide for the proper cross ventilation of the crawl space. If the purchaser or homeowner contracts with a person other than the retailer or installer for the skirting, the purchaser or homeowner is responsible for installing the moisture and ground vapor control measures and for providing for the proper cross ventilation of the crawl space.

(3) Clearance: If the manufactured home is installed according to the state's generic standards, a minimum clearance of 18 inches between the ground and the bottom of the floor joists must be maintained. In addition, the installer shall be responsible for installing the home with sufficient clearance between the I-Beams and the ground so that after the crossover duct prescribed by the manufacturer is properly installed it will not be in contact with the ground. Refer to §80.56 of this title for additional requirements for utility connections. It is strongly recommended that the installer not install the home unless all debris, sod, tree stumps and other organic materials are removed from all areas where footings are to be located.

(4) Drainage: The purchaser is responsible for proper site drainage where the manufactured home (new or used) is to be installed unless the home is installed in a rental community. It is strongly recommended that the installer not install the home unless the exterior grade is sloped away from the home or another approved method to prohibit surface runoff from draining under the home is provided. Drainage prevents water build-up under the home. Water build-up may cause shifting or settling of the foundation, dampness in the home, damage to siding and bottom board, buckling of walls and floors, delamination of floor decking and problems with the operation of windows and doors.

(5) Generic Moisture and Ground Vapor Controls:

(A) If the manufactured home is installed according to the state's generic standards and the space under the home is to be enclosed with skirting and/or other materials provided by the retailer and/or installer, an access opening not less than 18 inches in any dimension and not less than three square feet in area shall be provided by the installer. The access opening shall be located so that any water supply and sewer drain connections located under the home are accessible for inspections. If a clothes dryer exhaust duct, air conditioning condensation drain, or combustion air inlet is present, the installer must pass it through the skirting to the outside. In addition, crawl space ventilation must be provided at the rate of minimum 1 square foot of net free area, for every 150 square feet of floor area. At least six openings shall be provided, one at each end of the home and two on each side of the home. The openings shall be screened or otherwise covered to prevent entrance of rodents (note: screening will reduce net free area). For example, a 16' x 76' single section home has 1216 square feet of floor area. This 1216 square feet divided by 150 equals 8.1 square feet or 1166 square inches of net free area crawl space ventilation.

(B) The retailer and/or installer must notify the purchaser that moisture and ground vapor control measures are required if the space under the home is to be enclosed. Water vapor build-up may cause dampness in the home, damage to siding and bottom board, buckling of walls and floors, delamination of floor decking and problems with the operation of windows and doors. The generic ground vapor control measure shall consist of a ground vapor retarder that is minimum 6 mil polyethylene sheeting or its equivalent, installed so that the area under the home is covered with sheeting and overlapped approximately 12 inches at all joints. Any tear larger than 18 inches long or wide must be taped using a material appropriate for the sheeting used. The laps should be weighted down to prevent movement. Any small tears and/or voids around construction (footings, anchor heads, etc.) are acceptable.

(c) Notice: The site preparation notice to be given to the consumer shall be as follows:
Figure: 10 TAC §80.54(c) (No change.)

(d) Footers and Piers:

(1) Proper sizing of footings depends on the load carrying capacity of both the piers and the soil. To determine the load bearing capacity of the soil, the installer may use any of the following methods:

(A) Pocket penetrometer:

(i) Test a typical area adjacent to or within 10 feet of the perimeter of the unit;

(ii) Dig down to undisturbed soil. This should be a minimum of 1 square foot surface area; and

(iii) Using the pocket penetrometer take seven (7) readings, eliminate the highest and the lowest and average the remaining five (5).

(B) Soil surveys from the U.S. Department of Agriculture;

(C) Values from tables of allowable or presumptive bearing capacities given in local building codes. Such tables are commonly available from the local authority having jurisdiction; or

(D) Any other test data from soil analysis reports.

(2) The footing must be placed on firm, undisturbed soil, or fill compacted to at least 90% of its maximum relative density. Installation on loose, noncompacted fill may invalidate the home's limited warranty.

(3) Footer configurations:
Figure: 10 TAC §80.54(d)(3) (No change.)

(4) Footer sizing and capacities: The following tables represent maximum loads and spacings based on footer size and soil bearing capacity. Other approved footers may be used if equal or greater in bearing area than those footer sizes tabulated.
Figure: 10 TAC §80.54(d)(4)

(5) Piers and pier spacings: One of the most important parts of home installation is proper pier installation. Incorrect size, location or spacing of piers may cause serious structural damage to the home. Spacing and location of piers shall be in accordance with the tables listed in these standards (Table 3B, without perimeter piers; Table 3C, with perimeter piers).

(A) Spacing shall be as even as practicable along each main I-Beam. Pier spacing may exceed tabulated values up to 30% so long as the total pier count remains the same. End piers are to be located within 24 inches of the end of the main frame.

(B) Piers shall extend at least 6 inches from the centerline of the I-Beam or be designed to prevent dislodgment due to horizontal movement of less than 4 inches.

(C) Load bearing supports or devices shall be listed by an independent testing laboratory, nationally recognized inspection agency, or other nationally recognized organization and approved by the department. Engineers or architects licensed in Texas may design load bearing supports or devices for a single installation. A copy of the design for this particular home and site shall be provided to the department before the home is installed, but department approval is not required.

(D) Sidewall openings greater than 4 feet shall have perimeter piers located under each side of the opening, i.e. patio doors, recessed porches/entries, bay windows and porch posts. Perimeter piers for openings are not required for endwalls.

(6) Pier design: Piers shall be constructed per the following details:
Figure: 10 TAC §80.54(d)(6)

(A) Shimming (if needed): Hardwood shims are commonly used as a means for leveling the home and filling any voids left between the bottom flange of the I-Beam and the top of the pier cap. Wedge shaped shims must be installed from both sides of the I-Beam to provide a level bearing surface. The allowable height must not exceed 1 inch. Shims shall be a minimum of 3 inches wide and 6 inches long. Over shimming should be avoided.

(B) Table 3B--Pier loads (pounds) at tabulated spacings WITHOUT perimeter supports:
Figure: 10 TAC §80.54(d)(6)(B) (No change.)

(C) Table 3C--Pier loads (pounds) at tabulated spacings WITH perimeter supports:
Figure: 10 TAC §80.54(d)(6)(C)

(7) Typical multi-section pier layout:
Figure: 10 TAC §80.54(d)(7) (No change.)

(8) Typical single section pier layout:
Figure: 10 TAC §80.54(d)(8) (No change.)

(9) Multi-section units mating line column supports:

(A) On multi-section units, openings larger than 4 feet must have piers installed at each end of the opening. To determine the pier loads, refer to Table 3D in subparagraph (D) of this paragraph.
Figure: 10 TAC §80.54(d)(9)(A) (No change.)

(B) Column loads for each section may be combined when the columns are opposite each other. The footer must be sized for the combined loading.

(C) Additional piers are required under marriage walls (see wall between column #3 and #4 in the Marriage Line Elevation drawing in subparagraph (A) of this paragraph). The maximum spacing is the same as the spacing at the main I-Beams, without perimeter piers, and one half the spacing of the perimeter piers, with perimeter piers installed.

(D) Table 3D: Mating line column loads (pounds).
Figure: 10 TAC §80.54(d)(9)(D) (No change.)

§80.55. Anchoring Systems.

(a) General Requirements: For units built on or after September 1, 1997, the installer must verify that the unit is designed for the Wind Zone in which it is to be installed. Note: A Wind Zone I unit, built on or after September 1, 1997, may not be installed in a Wind Zone II area. However, a Wind Zone II unit may be installed in a Wind Zone I area.
Figure: 10 TAC §80.55(a) (No change.)

(b) Material Specifications:

(1) Strapping shall be Type 1, Finish B, Grade 1 steel strapping, 1.25 inches wide and 0.035 inches in thickness, certified by a licensed professional engineer or architect as conforming with the American Society for Testing and Materials (ASTM) Standard Specification D3953 91, Standard Specification for Strapping, Flat Steel, and Seals. Tie materials shall be capable of resisting an allowable working load of 3,150 pounds with no more than 2% elongating and shall withstand a 50% overload (4,725 pounds total). Ties shall have a resistance to weather deterioration at least equivalent to that provided by coating of zinc on steel of not less than 0.30 ounces per square foot on each side of the surface coated (0.0005 inches thick), as determined by ASTM Standards Methods of Test for Weight of Coating on Zinc-coated (galvanized) Iron or Steel Articles (ASTM A 90-81). Slit or cut edges of zinc-coated steel strapping are not required to be zinc coated. Strapping shall be marked at least every five feet with the marking described by the certifying engineer or architect.

(2) All anchoring components must be approved by the department. Installers shall only use approved anchoring components. An installer may obtain a list of approved anchoring components from the department, anchor manufacturer and/or supplier of anchoring components.

(c) Anchors shall be installed per the following details:

(1) in direction of load,
Figure: 10 TAC §80.55(c)(1) (No change.)

(2) installed against direction of load (vertical and/or angled), a stabilizer plate must be installed.
Figure: 10 TAC §80.55(c)(2)

(d) WIND ZONE I Installation:

(1) Typical anchor layout, single and multi-section units (WIND ZONE I ONLY):
Figure: 10 TAC §80.55(d)(1) (No change.)

(2) Table 4A: The following table describes the maximum spacing for diagonal ties along each side of the unit.
Figure: 10 TAC §80.55(d)(2)

(3) Table 4B: Minimum number of diagonal ties required per side, per unit length. Table based on 2 feet inset of anchors at each end.
Figure: 10 TAC §80.55(d)(3)

(4) When approved auger anchors cannot be inserted into a difficult soil after moistening, such as mixed soil and rock or caliche (heavily weathered limestone) that is not solid rock, approved cross drive rock anchors may be used in accordance with the values and notes for Table 4A in paragraph (2) of this subsection modified as follows:

(A) since the ultimate anchor pull out in the difficult soil will be reduced, the maximum spacing for diagonal ties per side is one half the spacing allowed by Table 4A which will require adding one additional cross drive rock anchor for each anchor specified for the sides and ends;

(B) the rods of the approved cross drive rock anchors must be fully inserted, have at least 24 inches of the rod lengths embedded in the difficult soil, and be restrained from horizontal movement, when feasible, by a stabilizer plate between the rods and the home; and

(C) each cross drive rock anchor is connected to one diagonal tie and is not connected to a vertical tie.

(e) WIND ZONE II Installation:

(1) In place of the requirements as shown in subsection (d) of this section, units designed for Wind Zone I and built prior to September 1, 1997, and units designed for Wind Zone II and built prior to July 13, 1994, require diagonal ties as set forth in Table 5A when these units are installed in Wind Zone II. See also §80.50 of this title (relating to Wind Zone Regulations). Items not specifically addressed in this section are the same as for Wind Zone I installations.
Figure: 10 TAC §80.55(e)(1)

(2) Units built to Wind Zone II on or after July 13, 1994.

(A) Units built to Wind Zone II on or after July 13, 1994, should have either built-in, or provisions for connecting, vertical ties along the sidewall(s) of each unit(s). A diagonal tie must be installed at each vertical tie location (except for designated shearwall tie). Built-in vertical ties shall be connected to anchors. If there are brackets or other provisions for connecting vertical ties, vertical ties shall be added at the brackets or provisions and connected to anchors.

(B) Only factory installed vertical ties may be closer than 4 feet from each other.

(C) Where tie locations are clearly marked as a shear wall strap, a perimeter pier must be installed at that location. See subsection §80.54(d) of this title (relating to Standards for the Installation of Manufactured Homes) for perimeter pier construction. Diagonal tie is not required.

(D) Where the vertical tie spacing exceeds 8'-0" on-center (see also note 6 in table 5A for exception), the anchoring system must be approved by the home manufacturer's installation manual, or designed by a professional engineer or architect licensed in the state of Texas.

(E) Where pier heights exceed 36 inches in height, the diagonal strap shall be connected to the opposite I-Beam (see Figure 1).
Figure: 10 TAC §80.55(e)(2)(E) (No change.)

(F) Where vertical tie locations are not easily discernable, the vertical ties may be connected to the main I-Beam rails and the anchor installed directly below that connection point. The diagonal tie must be connected to the opposite main I-Beam. In no case shall the distance between those ties exceed 5'-4" on-center (see Figure 2).
Figure: 10 TAC §80.55(e)(2)(F) (No change.)

(3) Multi-section centerline anchoring requirements (Wind Zone II only):

(A) centerline anchor ties are required for ALL Wind Zone II installations, regardless of the date the unit was manufactured, when installation occurs on or after the effective date of these rules.

(B) factory installed centerline vertical ties, brackets, buckles or any other connecting devices must be connected to a ground anchor. No additional anchors as described in subparagraph (D) of this paragraph are required.

(C) to avoid obstructions and/or piers and footers, the anchor may be offset up to 12 inches perpendicular to the centerline.

(D) where factory preparations do not exist, install anchors and angle iron brackets at each side of mating line openings wider than 48 inches per table 5B (see Figure 5B for detail).

(i) Where equal spans exist opposite each other (i.e., each section), a double bracket assembly may be used. The maximum opening is per table 5B. Total uplift load may not exceed the anchor and/or strap capacity (i.e., 3150 pounds).

(ii) the angle iron bracket is minimum 11 gauge. The holes for the lag screws are a maximum of 4 inches apart.

(iii) lag screws/bolts are minimum 5/16 x 3 inches, full thread.

(4) For openings separated by a wall or post 16 inches or less in width, the opening span is the total of the spans on each side of the wall/post.

(f) Bracket Installation.

(1) Table 5B: Maximum Centerline wall opening for column uplift brackets (see figure 5B for typical installation details).
Figure: 10 TAC §80.55(f)(1) (No change.)

(2) Figure 5B shows both single and double bracket assemblies for illustration purposes only. Use a single bracket for openings which exist on one section only. Use double bracket where openings are opposite each other on two sections of the home.

(3) When only one bracket assembly is required, it may be installed on either side of the column/opening stud(s), but no more than 12 inches from the column or opening stud(s). (See examples in figure 5C.)

(4) When two bracket assemblies are required, they must be installed on each side of the column/opening stud(s), but no more than 12 inches from the column/opening stud(s) (see examples in figure 5C), and they must be angled away from each other a minimum of 12 inches.
Figure: 10 TAC §80.55(f)(4)

(5) Example: A double section unit with each section being 14 feet wide;

(A) Span "A" is 18'-0", matching span both sections;

(B) Span "B" is 14'-8", matching span both sections;

(C) Span "C" is 6'-8", matching span both sections; and

(D) Span "D" is 13'-4", one side only.
Figure: 10 TAC §80.55(f)(5)(D) (No change.)

(6) Longitudinal ties:

(A) Longitudinal ties are required for ALL wind zone installations, regardless of the date of manufacture, when installation occurs after the effective date of these rules.

(B) Longitudinal ties are designed to prevent lateral movement along the length of the home.

(C) When conventional anchors and straps are used, install the required number of ties per Table 4A or Table 5A as appropriate. The strap(s) may be connected or wrapped around front or rear chassis header members, around existing cross members or spring hangers. A strap must be within 3 inches of where the cross member attaches to the main I-beam. Alternatively, brackets to receive the strap(s) may be welded to the bottom flange of the main I-beams. The location of the connection points along the length of the I-beams are not critical, as long as the number of longitudinal ties required for each end of each home section are installed with their pull in opposite directions. No two anchors shall be within 4 ft of each other. No two ties shall be attached to the same structural member of the home, other than a main longitudinal frame member or a front or rear chassis header member.

(D) Anchors require stabilizer plates when the anchor shaft is not in line with strap (plus or minus 10 degrees).

Figure: 10 TAC §80.55(f)(6)(D)

This agency 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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10 TAC §80.66

The amended section is adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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SUBCHAPTER E. GENERAL REQUIREMENTS

10 TAC §80.119

The amended section is adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted amendments.

§80.119. Installation Responsibilities.

(a) For new manufactured homes, the retailer is the installer and must warrant the proper installation of the home. If the retailer subcontracts with an independent licensed installer, then the subcontractor is jointly and severally liable for the portion of the installation that the subcontractor performed.

(b) For used manufactured homes, the person contracting with the consumer for the installation of the home is the installer and must warrant the proper installation of the home. If the contracting installer subcontracts with an independent licensed installer, then the subcontractor is jointly and severally liable for the portion of the installation that the subcontractor performed. The contracting installer is responsible to furnish the consumer with the installation warranty and site preparation notice. All verification and copies of the installation warranty and site preparation notice must be maintained in the installer's installation file for a period of no fewer than six (6) years from the date of installation.

(1) The person contracting directly with the consumer for only the transportation of the used home to a manufactured home site is not an installer if the person does not contract to perform or perform any installation functions. In this case, the installer is the person that contracts for the construction of the foundation systems, whether temporary or permanent, and the placement and erection of the used home and its components on the foundation system.

(2) The selling retailer may sell a used home and deliver possession to the consumer at the sales location (e.g. F.O.B. the sales location). In this case, the retailer shall not perform any installation functions nor transport the home to the home site.

(c) The installer is fully responsible for the complete installation even though the installer may subcontract certain installation functions to independent contractors pursuant to §7(i) of the Standards Act. It is unlawful for a subcontractor who is acting as an agent for a licensed installer to advertise and/or offer installation services to any person unless the licensed installer's name appears prominently in the advertisement.

(d) The sale of a new or used home by a retailer which includes an agreement to deliver the home and install the home at the home site is not completed until possession of the home is tendered to the consumer at the home site.

(e) Electrical, fuel, mechanical, and plumbing system crossover connections for multi-section homes, and completions of drain lines underneath all homes in accordance with DAPIA approved on-site assembly drawings are installer responsibilities and cannot be excluded by wording of the installation contract. The installation of air conditioning at the home site must be performed by a licensed air conditioning contractor. The installation and ventilation of skirting or other material that encloses the crawl space underneath a manufactured home is an installer responsibility, if it is part of the sales or installation contract.

(f) For all secondary moves (where there is not title transfer) the Notice of Installation Affidavit and the required fee must be submitted to the department within ten (10) working days after the installation is completed.

(g) When the installer selects the department to inspect the permanent foundation before concealment, the installer shall file an application to install a manufactured home on a permanent foundation on a form approved by the department. The $100 fee for the permanent foundation installation report shall be forwarded with the application. After the department inspects the permanent foundation and indicates acceptance of the permanent foundation on the form, the title company, attorney, retailer, or retailer's agent later files the Notice of Installation Affidavit, including a copy of the form, with the public land records of

the county and forwards a copy to the department. The $100 reporting fee does not have to be paid to the department again.

(1) Unless the retailer/installer follows the home installation manual or a department pre-approved foundation systems, a copy of the foundation system drawing as stamped and signed by the licensed engineer or architect must be filed with the application.

(2) The application must be received by the department at least ten (10) calendar days prior to the date on which construction of the permanent foundation system is scheduled to begin. No additional notice is required if the scheduled construction is delayed.

(3) Installers shall provide a copy of the application and the foundation system drawing to the department inspector at the time an inspection is performed.

(4) If the permanent foundation system design is approved by the authorized local government official and if the applicable building inspection fees are paid to the local government, the provisions of this section do not apply. The installer must, however, file a sworn statement of these facts with the Notice of Installation Affidavit.

(5) If the permanent foundation for a home acquired and installed before January 1, 2002 is certified by the consumer/mortgagor and the lender/mortgagee in a real estate transaction, or is certified by the owner if there is no lien or the lien has been released, as having permanently affixed the structure to the real estate, the provisions of this section do not apply. The $100 fee for the foundation installation must be paid and sent to the department along with the certification.

(6) When specifically requested in writing by the department with a Department Real Estate Inspection Request Form, a contracting local government shall make and perform inspection and enforcement activities related to the construction of the foundation that permanently affixes a manufactured home to real estate. If the permanent foundation system and other site improvements are inspected and accepted by a contracting local government official before concealment, the local government records may be the verification required by Section 19A(c) of the Standards Act. The retailer/installer must file a Notice of Installation, including a copy of the local government inspection report, with the public land records of the county and forward a copy of the Notice of Installation to the department with the $100 reporting fee.

(7) If the site suitability, site preparation, site improvement, foundation construction, and installation for a home acquired on or after January 1, 2002 are verified by a retailer or installer, the provisions of this section do not apply, but the title company, attorney, retailer, or retailer's agent must file a Notice of Installation with the public land records of the county and forward a copy of the Notice of Installation to the department with the $100 reporting fee.

(h) If a manufactured home will be installed as personal property on land not owned by the consumer, the retailer/installer must complete the installation in accordance with the standards and requirements of this chapter and file the Notice of Installation Affidavit, marked as "Method A," and shall accompany title application within ten (10) working days after the installation is completed.

This agency 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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Bobbie Hill

Executive Director, Manufactured Housing Division

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-2206

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10 TAC §§80.121 - 80.124, 80.128, 80.130, 80.132, 80.135

The new and amended sections are adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted amendments.

§80.123. License Requirements.

(a) Manufacturer. Any person constructing or assembling new manufactured housing for sale, exchange, or lease purchase within this state shall be licensed as a manufacturer. An application shall be submitted on the form required by the department and shall be completed giving all the requested information. The application shall be accompanied by the required security, Articles of Incorporation or Assumed Name Certificate, and payment of the license fee. Every distinct corporate entity must be separately licensed. Each separate plant location operated by a license holder which is not on property which is contiguous to or located within 300 feet of the license holder's licensed manufacturing facility requires a separate license and security.

(b) Retailer. Any person engaged in the business of buying for resale, selling, or exchanging manufactured homes or offering such for sale, exchange, or lease purchase to consumers shall be licensed as a retailer. An application for license shall be submitted on the form required by the department and be completed giving all the requested information. The application shall be accompanied by the required security, Articles of Incorporation or Assumed Name Certificate, and payment of the license fee. No person shall be considered a retailer unless engaged in the sale, exchange, or lease purchase of two or more manufactured homes to consumers in any consecutive twelve (12) month period. Sales, exchanges, or lease purchases by any employee or agent of a business entity are deemed to be sales of the business entity. Each separate sales location which is not on property which is contiguous to or located within 300 feet of a licensed sales location requires a separate license and security.

(c) Broker.

(1) Any person engaged by one or more other persons to negotiate or offer to negotiate bargains or contracts for the sale, exchange, or lease purchase of a manufactured home to which a certificate or document of title has been issued and is outstanding shall be licensed as a manufactured housing broker. An application for license shall be submitted on the form required by the department and be completed giving all the requested information. The application shall be accompanied by the required security, Articles of Incorporation or Assumed Name Certificate, and payment of the license fee. Each office location of the broker shall be licensed and proper security posted unless an office is on property which is contiguous to or located within 300 feet of an office licensed with the department.

(2) A broker shall not maintain a location for the display of manufactured homes without being licensed as a retailer.

(3) Paragraphs (1) and (2) of this subsection shall not apply to the sale, exchange, or lease purchase of a manufactured home in a single real estate transaction when the home and land are sold as realty with improvements.

(d) Rebuilder. Any person who desires to be licensed by the department to alter, repair, or otherwise rebuild a salvaged manufactured home, as that term is defined in §8(g) of the Standards Act, within this state, shall be licensed. An application shall be submitted on the form required by the department and shall be completed, giving all the requested information. The application shall be accompanied by the required license fee and Articles of Incorporation or Assumed Name Certificate.

(e) Installer.

(1) Every person who contracts to perform or performs installations shall submit the required security, complete the necessary license forms and any other information needed, and be issued a license prior to performing an installation function. The required license fee must accompany the application for license and Articles of Incorporation or Assumed Name Certificate.

(A) Each applicant for license shall have public liability insurance coverage, including completed operations coverage in an amount of not less than $300,000 for bodily injury each occurrence and property damage insurance in an amount of not less than $100,000 each occurrence. A combined single limit of $300,000 will be considered to be in compliance with this section. If the applicant will be engaged in the transportation of manufactured housing incidental to the installation, the applicant must also have motor vehicle liability insurance coverage in an amount of not less than $250,000 bodily injury each person, $500,000 bodily injury each occurrence, $100,000 property damage each occurrence. A combined single limit of $500,000 will be considered to be in compliance with this section. Cargo insurance on each home or transportable section of not less than $50,000 per towing motor vehicle is required.

(B) At the time of initial license and on renewal, a certificate of insurance must be filed with the department by the insurance carrier or its authorized agent certifying the kind, type and amount of insurance coverage and which provides for thirty (30) calendar days notice of cancellation. If the applicant does not provide proof of the required motor vehicle liability insurance and the cargo coverage, the applicant must sign an affidavit that the applicant will not engage in any transportation of manufactured housing. If the applicant transports only his/her own property, and furnishes the department with an affidavit attesting to that fact, cargo coverage is not required.

(C) An installer, also licensed as a retailer, may satisfy the insurance requirements by filing a certificate of insurance which shows that the license holder has motor vehicle-garage liability coverage including completed operations, and has dealer's physical damage (open lot) including transit insurance coverage in amounts not less than those set forth in subparagraph (A) of this paragraph.

(D) If the required insurance coverage expires or is canceled, and proof of replacement coverage is not received prior to the expiration date or date of cancellation, the installer's license is automatically terminated.

(2) The installer responsible for the installation in accordance with the provisions of §80.119 of this title (relating to Installation Responsibilities) shall maintain a file containing a copy of the installation report as filed with the department.

(f) Homeowner's Temporary Installation.

(1) A homeowner may apply for a temporary license as an installer for the purpose of installing such owner's used manufactured home. The application shall be submitted on a form and contain such information as required by the department, and it must be accompanied by a cashier's check or money order payable to TDHCA in payment for the required fee. The issuance of a homeowner's temporary installer's license by the department shall not relieve any warranty responsibility required by the Standards Act except for damage or defects which may occur as a result of the installation of the home by the homeowner.

(2) The application must be accompanied by a certificate of insurance issued by the insurance carrier or its authorized agent to prove insurance coverage for the installation of the home as follows: public liability insurance coverage including completed operations in an amount of not less than $300,000 for bodily injury each occurrence and property damage insurance in an amount of not less than $100,000 each occurrence, for which a combined single limit of $300,000 will be considered to be in compliance with this section; and motor vehicle liability insurance coverage of not less than $250,000 bodily injury each person, $500,000 bodily injury each occurrence and $100,000 property damage each occurrence, for which a combined single limit of $500,000 will be considered to be in compliance with this section. A copy of the home manufacturer's installation instructions, custom designed installation instructions stamped by a Texas licensed professional engineer or architect, or an installation plan with details and specifications conforming to the state's generic standards shall accompany the application.

(3) Upon approval of the application, the homeowner will be issued a temporary license for the installation of that home set out in the application and a temporary installer's (TI) number. The temporary license shall be valid only for thirty (30) calendar days.

(4) The temporary installer's (TI) number must be displayed on the back of the home in letters and figures not less than 8 inches in height when the home is moved over the roads, streets, or highways in this state.

(g) Salesperson.

(1) A salesperson means an individual, partnership, company, corporation, association, or other group who, for any form of compensation, sells or lease-purchases or offers to sell or lease-purchase manufactured housing to consumers as an employee or agent of a retailer or broker. A person or entity licensed as a retailer or broker with the department is not required to be licensed as a salesperson, and the owner of a sole proprietorship, a partner in a partnership, or an officer in a corporation which is duly licensed does not need a salesperson's license so long as such individual is listed in the ownership of the application filed with the department.

(2) The salesperson is an agent of the retailer or broker for whom sales or lease-purchases, or offers, are made. This includes the general manager, sales manager, office manager or anyone involved in showing and offering homes for sale. The retailer or broker is liable and responsible for the acts or omissions of a salesperson in connection with the sale or lease-purchase of a manufactured home. It is a violation of the Standards Act and this chapter for a retailer or broker of manufactured housing to employ a salesperson who is not licensed with the department.

(3) An application for license must be made by every salesperson. Each applicant for a salesperson's license must file with the department an application for license on a form provided by the department containing:

(A) the full legal name, permanent mailing address, date of birth, telephone number, Texas driver's license number or Texas identification number, and social security number of the applicant;

(B) places of employment of the applicant for the preceding three (3) years, providing the name of firm(s), address(es), and dates of employment;

(C) a statement that the applicant is the authorized agent for a manufactured housing retailer or broker; the statement shall be signed by the employer. If there is a change in name, address, telephone, e-mail address, or employer, an amended application must be submitted to the department within ten (10) calendar days of this change.

(4) Except as may otherwise be authorized, the fee for a salesperson's license shall be submitted to the department in the form of a cashier's check or money order. Salesperson licenses shall be valid for a period of one (1) year from the date of issuance.

(5) Payment of the renewal fee shall be made by the salesperson and submitted to the department along with the completed license renewal notice prior to the expiration of the current license.

(6) Salespersons shall be issued a license card by the department containing effective date and license number. The salespersons shall be required to present a valid license card upon request.

(h) Applicable License Holder Ownership Changes.

(1) A license holder shall not change the location of a licensed business unless the license holder first files with the department:

(A) a written notification of the address of the new location;

(B) an endorsement to the bond reflecting the change of location; and

(C) original license.

(2) The change of location is not effective until the notification and endorsement are received by the department.

(3) For a change in ownership of less than fifty percent (50%) of the licensed business entity, no new license is required provided that the existing bond or other security continues in effect. However, the current Articles of Incorporation or Assumed Name Certificate must accompany the request.

(4) For a change in ownership of fifty percent (50%) or more, the license holder must file with the department, along with the appropriate fee and Articles of Incorporation or Assumed Name Certificate:

(A) a license addendum by the purchaser providing information as may be required by the department; and

(B) certification by the surety that the bond for the licensed business entity continues in effect after the change in ownership; or

(C) an application for a new license along with a new bond or other security and proof that the education requirements of §7(p) of the Standards Act, have been met.

(i) Education Requirements. Effective September 1, 1987, all applicants for license, except salespersons, shall attend and complete 20 hours of educational instruction as required by the Standards Act and this chapter. A manufacturer may request a one-day in-plant training session be presented by the department in lieu of completing the instruction requirement. The license will not be issued until the owner, partner, corporate officer, or other person who will personally have the day-to-day management responsibility for the business location, or the salesperson to be licensed, attends and completes this educational requirement. This section shall not apply to the renewal of licenses, nor to the license of additional business locations.

(j) Approving a training program conducted by a nonprofit educational institution or foundation as sanctioned by §7(q) of the Standards Act.

(1) An organization requesting approval to conduct the educational course required by the Standards Act must file a course approval request and course materials at least ninety (90) calendar days before the date of the first scheduled presentation. The director shall deliver a written notice of approval or disapproval no later than thirty (30) calendar days after receiving the request. If disapproved, the requestor may resubmit the course with corrections. The director will deliver a written notice of approval or disapproval no later than fifteen (15) calendar days after receiving the re-submittal.

(A) Approval of Training Program: The director will approve the training program if the requirements in this subsection are met and the materials submitted comply with the required course topics in paragraph (3) of this subsection.

(B) Disapproval of Training Program: The director will not approve the training program if the requirements are not met and the materials submitted do not comply with the required course topics in paragraph (3) of the subsection. The requestor will receive a written notice detailing the reason(s) for the disapproval. The requestor may re-submit the course with corrections as mentioned in paragraph (1) of this subsection.

(2) As a prerequisite for a license, the course must be twenty (20) hours in length and instruct the potential attendee in the law and consumer protection regulations.

(3) An educational training course shall consist of the following topics:

(A) Presentation of the Law and Rules.

(i) Article 5221f, the Standards Act

(ii) Chapter 80, Texas Administrative Code, Administrative Rules

(iii) Texas Finance Code (applicable sections)

(iv) Texas Transportation Code (applicable sections)

(v) Federal Truth -in-Lending Act

(vi) Property Code

(B) Titling.

(i) Seals

(ii) Titling Fees

(iii) Titling Process

(iv) Description of Forms

(v) Title Cancellation and Reinstatement Process

(C) Licensing.

(i) Manufacturer Application Form Requirements

(ii) Retailer Application Form Requirements

(iii) Installer Application Form Requirements

(iv) Salesperson Application Form Requirements

(v) Broker Application Form Requirements

(vi) Salvage/Rebuilder Application Form Requirements

(vii) Insurance and Bond Requirements

(viii) License Renewal and Revision Requirements

(ix) Sale of non-habitable homes

(x) Retailer and Installer Responsibilities

(D) Installations.

(i) Anchoring, supporting, and multi-section connecting standards

(ii) Requirements for Completing the Installation Inspection Report Form

(E) Consumer Complaints.

(i) Consumer Complaint Process

(ii) Delivery of Warranty

(iii) Correction Requirements

(iv) Requirements for Completing the Complaint Forms

(F) Dispute Resolution.

(i) Dispute Resolution Process

(ii) Texas Government Code, Chapter 2306

(iii) Federal Trade Commission Manual: "How to Advertise Consumer Credit"

(iv) Business & Commerce Code, Deceptive Trade Practices (applicable sections)

(4) The training organization must provide each attendee of the class with written proof of having completed the entire 20 hour course.

(5) The primary administrator for the training program will be notified by the director of changes to the Law and Rules and the date that the changes will become effective.

(6) The director may revoke course approval for failure to comply with the standards or procedures set forth in this subsection. Unless surrendered or revoked for cause, the approval will be valid for a period of two (2) years.

(k) Denial, Suspension, Renewal Denial, or Revocation of License Relating to Repeat Violations of the Standards Act or Department Rules.

(1) The following criteria shall be utilized to determine whether an applicant shall be issued or renewed a license if the applicant within the last two years from the date of the application has:

(A) two Agreed Final Orders of the same kind or type of violations; or

(B) one Final Order of the same kind or type of violations.

(2) If the department suspends, revokes, or denies renewal of a valid license, or denies a person's license or the opportunity to be examined for a license in accordance with this subsection because of the person's prior violations history, the department shall:

(A) notify the person in writing stating reasons for the suspension, revocation, renewal denial, denial of disqualification; and

(B) offer the person the opportunity for a hearing on the prior violation history.

(l) Denial, Suspension, Renewal Denial, or Revocation of License relating to the history of non-compliance with the Standards Act and Rules.

(1) The department will consider the background of the applicant, license holder, sole proprietor, partner officer, managing employee, chief executive officer, chief executive operating officer, and directors of a corporation.

(2) In the evaluation the department will consider the non-compliance history with the Standards Act and this chapter and will comply with the Texas Government Code, Chapter 2001, in proceeding with denial, suspension, or revocation of a license.

(m) Denial, Suspension, Renewal Denial, or Revocation of License Relating to Criminal Background.

(1) The following criteria shall be utilized to determine whether an applicant shall be issued a license if that applicant states in his/her application for said license that he/she has a record of criminal convictions within five (5) years preceding the date of the application:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the intended manufactured housing business activity;

(C) the extent to which a license holder might engage in further criminal activity of the same or similar type as that in which the applicant previously had been involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the functions and responsibilities of the license holder's occupation or industry; and

(E) whether the offenses were defined as crimes of moral turpitude by statute or common law, from Class A misdemeanors to first, second, and third degree felonies carrying fines and/or imprisonment or both. Special emphasis shall be given to the crimes of robbery, burglary, theft, embezzlement, sexual assault, and conversion.

(2) In addition to the factors that may be considered in paragraph (1) of this subsection, the department, in determining the present fitness of a person who has been convicted of a crime, may consider the following:

(A) the extended nature of the person's past criminal activity;

(B) the age of the person at the time of the commission of the crime;

(C) the amount of time that has elapsed since the person's last criminal conviction;

(D) the conduct and work activity of the person prior to and following the criminal conviction;

(E) evidence of the person's rehabilitation or attempted rehabilitation effort while incarcerated or following release; and

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

(3) It shall be the responsibility of the applicant to the extent possible to secure and provide to the department the recommendations of the prosecution, law enforcement, and correctional authorities as required by this subsection.

(4) The applicant shall furnish proof in any form, as may be required by the department, that he/she has maintained a record of steady employment 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 the applicant was convicted.

(5) If the department suspends or revokes a valid license, or denies a person a license or the opportunity to be examined for a license in accordance with this subsection because of the person's prior conviction of a crime and the relationship of the crime to the license, the department shall:

(A) notify the person in writing stating reasons for the suspension, revocation, denial, or disqualification; and

(B) offer the person the opportunity for a hearing on the record.

(n) License Renewal Requirements. It is the responsibility of the license holder to renew the license prior to its expiration date.

(1) The department will mail each license holder a renewal notice and application for renewal at least forty-five (45) calendar days prior to the date on which the current license expires. Notice will be mailed to the last known address indicated in department records.

(2) In order to prevent the expiration of a certificate of license, all applications for license renewals must be received by the department prior to the date on which the current license expires.

(3) If an application for license renewal is received by the department after the date on which the current license expires, the license will not be reinstated except with approval of the director. The director may require a hearing prior to reinstatement.

(4) All renewal licenses and a reinstatement license approved by the director shall be dated as of the day following the date on which the current license expires.

(o) Application and Appeals.

(1) Initial application processing.

(A) It is the policy of the department to issue the license within seven (7) working days after receipt of all required information and the following conditions have been met:

(i) all required forms are properly executed; and

(ii) all requirements of applicable statutes and department rules have been met.

(B) License applications and accompanying documents received shall be processed and issued within seven (7) working days if all conditions for license have been met.

(C) License applications and accompanying documents found to be incomplete or not properly executed shall be returned to the applicant with an explanation of the specific reason and what information is required to complete license. Upon receipt of all required information, the license will be issued within seven (7) working days.

(D) Upon written request, the department will call the license holder and provide the license number assigned.

(2) Appeals. Applicants may appeal any dispute arising from a violation of the time periods set for processing an application. An appeal is perfected by filing with the director a letter explaining the time period dispute. The letter of appeal must be received by the director no later than twenty (20) calendar days after the date of the letter of explanation from the department outlined in paragraph (1)(C) of this subsection. The department will decide the appeal within twenty (20) calendar days of the receipt of the letter of appeal by the director.

This agency 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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Bobbie Hill
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-2206

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SUBCHAPTER F. CONSUMER NOTICE REQUIREMENTS

10 TAC §80.180

The amended section is adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. TITLING

10 TAC §§80.202, 80.204, 80.205, 80.207, 80.208

The amended sections are adopted under the Texas Manufactured Housing Standards Act, Texas Civil Statutes, Article 5221f, §9, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the adopted amendments.

§80.204. Titling Forms.

(a) Manufacturer's Certificate of Origin (MCO).

(1) The manufacturer shall issue a Manufacturer's Certificate of Origin (MCO) for each new home which is consigned, transferred, or sold by the manufacturer to a retailer in this state. The certificate of origin information shall be on a form prescribed by the department or it will be returned for reissuance.

(2) The MCO shall be surrendered to the department upon application for the issuance of an initial document of title to the home or the application for Certificate of Attachment.

(3) If a new home is sold by an out-of-state retailer to a consumer in this state and the MCO is not on the form prescribed by the department, there must be attached to the original MCO a separate sheet certified by the manufacturer which contains all of the information required by the Texas MCO.

(b) Application for Issuance of Document of Title, or Certificate of Attachment to a Manufactured Home.

(1) The manufactured home document of title, or Certificate of Attachment shall be issued on the basis of information submitted on a properly executed application for a document of title containing the following information:

(A) a description of the home including the manufacturer's name and address;

(B) the model designation;

(C) the number of sections of the home;

(D) the total square feet of the home;

(E) the HUD label or Texas seal number and serial number;

(F) the weight and size of each section, excluding the hitch;

(G) the Wind Zone reflected on the MCO if available; and

(H) if available, the date of manufacture reflected on the MCO (the "date of manufacture" is the date the home was produced and the HUD label affixed to the home and is not to be construed as the "year model").

(2) The MCO shall accompany the application for a document of title or Certificate of Attachment on the original sale from retailer to private individual.

(3) Other information shall include, but not be limited to, the following:

(A) the name(s) and address(es) of the seller(s) and the county where currently installed;

(B) the name(s) and address(es) of the purchaser(s) and the county and location where the home will be installed;

(C) the name and address of the lienholder, if any, and the date of the lien.

(4) The department may return the application without processing if the lienholder information is not complete or appears to have been modified.

(5) The right of survivorship may be elected by the purchasers or transferees. The document of title shall indicate whether the right of survivorship has been elected.

(6) The application must contain the signatures of seller(s) and purchaser(s).

(7) The application and fees shall be submitted to the Manufactured Housing Division at the Austin headquarter's office, with supporting documents.

(c) Installation Information.

(1) The installation information, on forms approved by the department, must accompany each application for a document of title, or Certificate of Attachment and shall contain the following information:

(A) description of the home, including:

(i) serial number;

(ii) HUD label number or Texas seal number;

(iii) size of home;

(iv) name of manufacturer;

(v) Wind Zone, if available; and

(vi) map of the location of the home.

(B) whether or not the home was, or will be, moved as a result of the sale or transfer;

(C) whether or not the home was, or will be, installed at a new location as a result of the sale or transfer;

(D) the location of the home immediately prior to the sale or transfer;

(E) if moved, or to be moved, the location of the home after the move and the name and address of the person or company that moved, or will move, the home; and

(F) if installed, or to be installed, the location of the home after installation; and the name and address of the person or company that installed, or will install, the home.

(2) If the home was installed as a result of the sale or transfer, the installation fee required under §80.20(b) of this title (relating to Fees) must be submitted along with the installation information (Notice of Installation Affidavit). The installation fee may be combined with the titling fee for each home.

(d) Manufactured Home Document of Title.

(1) The department shall maintain records of ownership of manufactured homes. The department shall issue a manufactured home document of title for each manufactured home, except of the manufactured homes that are not titled by virtue of their being real property, which shall set forth the ownership of the home in accordance with the records of the department.

(2) The document of title shall contain the following information:

(A) the date of the certificate and the number of the certificate;

(B) the name(s) and address(es) of the purchaser(s) of the home and the county where the home is installed for occupancy;

(C) the name and address of the manufacturer, the model designation of the home, the number of sections, and the total square feet of living space in the home;

(D) the HUD label and/or Texas seal number, the serial number, and the size (excluding hitch) and the weight of each transportable section of the home;

(E) the name and address of the seller of the home;

(F) the date of any lien(s) and the name(s) and address(es) of the lienholder(s);

(G) designation of right of survivorship;

(H) the date of manufacture reflected on the MCO if available (the "date of manufacture" is the date the home was produced and the HUD label affixed to the home and is not to be construed as the "year model");

(I) Wind Zone, if available;

(J) a statement to the effect that the document of title may not reflect the existence of a tax lien notice filed for the manufactured home since the document of title was issued and that information about tax liens for which notice has been filed may be obtained from the department on written request.

(3) Each certificate shall be authenticated by the facsimile signature of the director. The facsimile signature shall be that of the person holding such position at the time the certificates are printed, and the validity of the certificates is not affected by any subsequent change.

(4) The department shall issue a manufactured home document of title in the following cases:

(A) after receipt of a properly executed application for a document of title, Notice of Improvement Attachment, or Notice of Attachment, installation information on forms approved by the department, and the MCO upon the initial retail sale;

(B) after receipt of a properly executed application for a document of title, Notice of Improvement Attachment, installation information on forms approved by the department, and the original manufactured home document of title when there is a transfer of ownership or the addition of a lien or lienholder;

(C) after receipt of a properly executed application by the owner for cancellation of the Certificate of Attachment due to the sale or transfer and removal of the home from the real property, and following an inspection by the department for habitability; notice of the cancellation of the Certificate of Attachment shall be filed with the county in which the real property is located.

(5) If the home is subject to any lien, the original of the document of title shall be mailed to the first lienholder of record. A nontransferable copy shall be mailed to the purchaser(s) and to the second lienholder, if any. If no lien exists, the original shall be mailed to the purchaser(s).

(e) Certificate of Attachment.

(1) In the event that a manufactured home is real property either because the owner has surrendered the document of title or no document of title has been issued because the manufactured home has been installed on property owned by the owner of the manufactured home, then the department shall issue a Certificate of Attachment.

(2) The Certificate of Attachment shall contain the following information:

(A) the name and address of the owner of the manufactured home;

(B) the legal description of the real property where the manufactured home is installed;

(C) the name and address of the manufacturer of the manufactured home, the model designation of the home, the number of sections, the HUD label and/or Texas seal number, the serial number, and the size (excluding hitch) of the manufactured home;

(D) certification by the department that the Manufacturer's Certificate of Origin or any document of title have been canceled; and

(E) name, address and license number of the selling retailer.

(f) Disclosure Required by §21(b) of the Standards Act.

(1) The disclosures required by §21(b) of the Standards Act are required to be given prior to the transfer of title to a manufactured home.

(2) Such disclosures are to be provided to the purchaser of a manufactured home in written form from a manufactured home retailer (or to one of the purchasers if more than one (1) purchaser). Acknowledgment of receipt by the purchaser is not required.

§80.205. Titling Transactions.

(a) Corrected Manufactured Housing Document of Title.

(1) The department shall make corrections to a manufactured home document of title upon receipt of a properly executed application for a document of title and the previously issued original.

(2) The corrected certificate of ownership shall be mailed to the lienholder of record if a lien is recorded and a copy shall be mailed to the purchaser(s) and any other lienholder(s). If no lien exists, the original shall be mailed to the purchaser(s).

(3) No fee shall be required for this transaction if an error was made by the department.

(b) For manufactured homes that are presumed to be personal property pursuant to §2.001 of the Property Code, the department shall issue a certified copy of the original manufactured home document of title or of the nontransferable copy upon receipt of a properly executed application for a document of title. If a lien is recorded on the document of title, the certified copy of the original document of title shall be mailed to the lienholder of record.

(c) Inventory Financing Liens.

(1) A lien and security interest on manufactured homes in the inventory of a retailer, as well as to any proceeds of the sale of those homes, is perfected by filing an inventory finance security form approved by the department and in compliance with these sections.

(2) The creditor-lender financing the inventory and the retailer must execute a security agreement which expressly sets forth the rights and obligations of the two parties in the inventory finance arrangement.

(3) The inventory finance security form shall contain the following:

(A) signatures of both the retailer and the creditor-lender;

(B) the name, sales location, address, and license number of the retailer; and

(C) the name and address of the creditor-lender.

(4) A separate form must be filed for each licensed sales location.

(5) For manufactured homes for which no document of title has been issued, the filing of the inventory-finance security form perfects a security interest in all manufactured homes, whether then owned or thereafter acquired, as well as to any proceeds of the sale of those homes, provided that:

(A) the home is financed by the creditor-lender;

(B) the creditor-lender has advanced any funds for the home; or

(C) the creditor-lender has incurred any obligation for the home.

(D) This security interest attaches to a particular manufactured home only when the act described in either subparagraph (A), (B), or (C) of this paragraph would either:

(i) enable the retailer to acquire the manufactured home;

(ii) pay the existing balance of a creditor-lender for funds secured by a security interest in the manufactured home;

(iii) in the event that the retailer and manufacturer are the same entity, pay funds to the manufacturer-retailer after completion of the manufacture of the manufactured home; or

(iv) in the event that the retailer has no debt owed against untitled new inventory, enable the retailer to use the manufactured home as security for a new debt.

(6) No provision in the security agreement between the parties to an inventory financing arrangement shall in any way modify, change, or supersede the requirements of this section for the perfection of security interests in manufactured homes in the inventory of a retailer.

(d) For Release of Lien.

(1) The lienholder of a lien recorded on a manufactured home document of title with the department shall deliver a properly executed release of lien form prescribed by the department to the owner of record within thirty (30) calendar days of the satisfaction of the debt or obligation secured by the lien.

(2) The lien recorded on a manufactured home document of title recorded with the department shall be released by the department upon receipt of a release of lien form properly executed by the lienholder of record, and a new document of title shall be issued to the owner(s) of record if the manufactured home is not real property.

(e) Foreclosure or Repossession.

(1) In the event of sale after either foreclosure or repossession of a manufactured home that is not real property, the department shall issue a new manufactured home document of title in the name of the purchaser, upon receipt of a properly executed application for title containing the following information:

(A) The description of the home shall be included along with an indication of whether the home is a foreclosure or repossession;

(B) The name and address of the lienholder and name of the person authorized to sign for the lienholder; and

(C) An indication of whether the home was repossessed by judicial order or sequestration. A true copy of the order or bill of sale shall be attached.

(D) A certification that the home will not be located on the same property of the previous owner.

(2) In the event of foreclosure or repossession of a manufactured home that is not real property, the department will not issue a new manufactured home document of title until receipt of release of lien.

(f) Surrender of Title Documents for Cancellation.

(1) The department shall cancel any outstanding title to a manufactured home upon receipt of a properly executed application or Notice of Installation Affidavit. Title documents shall be surrendered for cancellation in the following instances:

(A) The manufactured home, or transportable section, has been permanently affixed to real estate and is defined as real estate by the Property Code;

(B) The manufactured home, or transportable section, has been declared salvage as defined in §8 of the Standards Act; or

(C) The manufactured home has been sold, exchanged or transferred by lease purchase for business use.

(2) The department will not cancel a document of title if a lien is filed with the department or recorded on the manufactured home document of title. In either such instance, the department will notify the owner and each lienholder that the title has been surrendered for cancellation, and that the department will not cancel the title unless the lien is released.

(g) Right of Survivorship: If two or more eligible persons are shown as purchasers or transferees, they may execute the right of survivorship election on an application for title. Such election constitutes an agreement for the right of survivorship. If the survivorship election is taken, then the department will issue a new document of title to the surviving person(s) upon receipt of a copy of the death certificate of the deceased person(s), and a properly executed application for title.

This agency 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 July 29, 2002.

TRD-200204725
Bobbie Hill
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: September 8, 2002
Proposal publication date: April 5, 2002
For further information, please call: (512) 475-2206

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 70. INDUSTRIALIZED HOUSING AND BUILDINGS

16 TAC §§70.1, 70.50, 70.61, 70.70, 70.75, 70.90

The Texas Department of Licensing and Regulation adopts amendments to §§70.1, 70.50, 70.61, 70.70, 70.75, and 70.90 concerning industrialized housing and buildings as published in the June 7, 2002 issue of the *Texas Register* (27 TexReg 4900), without changes, and will not be republished.

The amendments delete the requirement for the manufacturer to report the shipping address for each unit labeled and add the requirement for the manufacturer to report the date the unit was labeled; add the requirement that a substantial portion of the energy compliance design must be inspected at least once every third inspection; add the requirement that the manufacturer's compliance control inspection checklist include an energy compliance design checklist that enumerates the energy code-compliance features of the units constructed; and require that a copy of the energy compliance design checklist be provided to the purchaser of the unit or units from the manufacturer or industrialized builder. The Department drafted and distributed the proposed rules to persons internal and external to the agency. No comments were received regarding the proposed amendments. The amendments will function by establishing procedures for administration and enforcement of the energy conservation codes adopted by the passage of legislation to promote more energy efficient buildings resulting in decreased energy costs for the building owners.

The amendments are adopted under the Texas Occupations Code, Chapter 51, and Texas Revised Civil Statutes, Article 5221f-1. The Department interprets Chapter 51 as authorizing the Executive Director to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The Department interprets Article 5221f-1 as authorizing the Commissioner to adopt rules as appropriate to implement the Act.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Texas Revised Civil Statutes, Article 5221f-1. No other statutes, articles, or codes are affected by the adoption.

This agency 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 July 25, 2002.

TRD-200204592
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: August 14, 2002
Proposal publication date: June 7, 2002
For further information, please call: (512) 463-7348

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CHAPTER 79. WEATHER MODIFICATION

16 TAC §§79.10, 79.12, 79.13, 79.17, 79.18, 79.20, 79.21, 79.32, 79.33, 79.42, 79.62

The Texas Department of Licensing and Regulation adopts amendments to §§79.10, 79.12, 79.13, 79.17, 79.18, 79.20, 79.21, 79.32, 79.33, 79.42, and 79.62 concerning the weather modification program as published in the June 7, 2002 issue of the *Texas Register* (27 TexReg 4904), without changes, and will not be republished.

The amendments provide clarity to the rules as requested by persons internal and external to the agency representing weather modification projects at an informal meeting held by the Department. The Department wishes to thank these persons and organizations who participated in this rulemaking process.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. No comments were received regarding the proposed amendments. The amendments will provide clarity and a greater consistency in methods used to determine the date(s) of filing documents with the Department which takes into account modern methods of data transmission (such as facsimile and electronic mail).

The amendments are adopted under Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the code sections in which it may be codified and Texas Occupations Code, Chapter 51. The Department interprets Senate Bill 1175, as authorizing the Texas Department of Licensing to adopt rules as necessary for implementation in order to assure compliance with the intent and purpose of this legislation. The Department interprets Chapter 51 as authorizing the Executive Director to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The statutory provisions affected by the adoption are those set forth in Senate Bill 1175, 1st Called Session, 77th Texas Legislature, and the sections in which it may be codified, and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adoption.

This agency 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 July 25, 2002.

TRD-200204593
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: August 14, 2002
Proposal publication date: June 7, 2002
For further information, please call: (512) 463-7348

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CHAPTER 80. LICENSED COURT INTERPRETERS

16 TAC §80.80

The Texas Department of Licensing and Regulation adopts an amendment to §80.80 concerning the fees for the licensed court interpreters program as published in the May 24, 2002 issue of the *Texas Register* (27 TexReg 4509), without changes, and will not be republished. The amendment corrects the original license application filing fee to $175 which was the amount authorized by the Texas Commission of Licensing and Regulation.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. No comments were received regarding the proposed amendment. The amendment will function by providing clarification regarding the original license fees as authorized by the Commission.

The amendment is adopted under Texas Occupations Code, Chapter 51, and Title 2, Texas Government Code, Chapter 57. The Department interprets Chapter 51 as authorizing the Executive Director to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. The Department interprets Chapter 57 as authorizing the Executive Director of the Texas Department of Licensing and Regulation to promulgate and enforce a code of

rules and take all action necessary to assure compliance with the intent and purpose of Chapter 57.

The statutory provisions affected by the adoption are those set forth in Title 2, Texas Government Code, Chapter 57, and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adoption.

This agency 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 July 25, 2002.

TRD-200204591
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: August 14, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 463-7348

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PART 9. TEXAS LOTTERY COMMISSION

CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

SUBCHAPTER A. PROCUREMENT

16 TAC §401.104

The Texas Lottery Commission adopts new section 16 TAC §401.104 relating to the contract monitoring roles and responsibilities of agency internal audit staff and other inspection, investigative, or compliance staff, without changes to the proposed text as published in the June 14, 2002 issue of the *Texas Register* (27 TexReg 5054). The purpose of the rule is to implement the requirements of §2261.202, Government Code, which requires state agencies that make procurements to which chapter 2261, Government Code applies, to establish and adopt by rule a policy that clearly defines the contract monitoring roles and responsibilities of that agency's internal audit staff as well as any other inspection, investigative, or audit staff within that agency. The rule has been drafted to be consistent with the requirements of the statute, and to specifically satisfy the rulemaking requirements applicable to state agencies under this chapter of the Government Code. The rule applies only to contracts that meet the applicability requirements set forth in §2261.001, Government Code.

No comments were received in connection with this rulemaking.

The new section is adopted under §467.102, Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction and §2261.202, Government Code, which requires state agencies, that make procurements to which chapter 2261, Government Code applies, to establish and adopt by rule a policy that clearly defines the contract monitoring roles and responsibilities of that agency's internal audit staff as well as any other inspection, investigative, or audit staff within that agency.

The new section implements §2261.202, Government Code and affects chapter 466, Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 29, 2002.

TRD-200204769
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: August 18, 2002
Proposal publication date: June 14, 2002
For further information, please call: (512) 344-5113

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 66. STATE ADOPTION AND DISTRIBUTION OF INSTRUCTIONAL MATERIALS

SUBCHAPTER B. STATE ADOPTION OF INSTRUCTIONAL MATERIALS

19 TAC §66.54, §66.57

The State Board of Education (SBOE) adopts amendments to §66.54 and §66.57, concerning state adoption and distribution of instructional materials. The sections specify requirements and procedures related to the number of sample review copies of instructional materials under consideration for adoption that must be submitted by publishers and that must be made available at regional education service centers (ESCs). Section 66.54 is adopted with changes to the proposed text as published in the May 24, 2002, issue of the *Texas Register* (27 TexReg 4513). Section 66.57 is adopted without changes to the proposed text as published in the May 24, 2002, issue of the *Texas Register* (27 TexReg 4513) and will not be republished.

During the March 2002 SBOE meeting, members heard testimony regarding the limited number of review copies of instructional materials under consideration for adoption available at the ESCs. The SBOE requested that staff prepare amendments to Chapter 66, State Adoption and Distribution of Instructional Materials, to address these concerns.

The adopted amendment to §66.54, Samples, requires that publishers provide ESCs with four sample copies of instructional materials rather than two. The two additional copies would provide greater access to the public for review. The adopted amendment to §66.57, Regional Education Service Centers: Procedures for Handling Samples; Public Access to Samples, requires ESCs to make available any additional copies to the public for checkout, rather than only one copy. In addition, new language requires the ESCs to make available appropriate information, such as locator information and passwords, to ensure public access to Internet-based instructional content throughout the review period.

Subsequent to filing the proposed amendment to §66.54 with the *Texas Register* as approved by the SBOE, agency legal counsel suggested a change for clarity. The proposed amendment in subsection (c) approved by the SBOE stated that the commissioner of education may negotiate the appropriate number of

samples a publisher must provide. Agency legal counsel advised that the phrase "negotiate the appropriate number" is vague and could be misinterpreted. Accordingly, the SBOE modified subsection (c) to substitute the phrase "specify a lesser number" in order to provide clarification and specificity regarding the number of samples required of publishers.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Education Code, §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of textbooks.

§66.54. Samples.

(a) Samples of student and teacher components of instructional materials submitted for adoption shall be complete as to content and representative of finished-format binding.

(b) Four sample copies of the student and teacher components of each instructional materials submission shall be filed with each of the 20 regional education service centers (ESCs) on or before the date specified in the schedule for the adoption process. These samples shall be available for public review. Publishers of Internet-based instructional content submitted for review shall provide the ESCs with appropriate information, such as locator information and passwords, required to ensure public access to their programs throughout the review period.

(c) If it is determined that good cause exists, the commissioner of education may extend the deadline for filing samples with ESCs or specify a lesser number of samples a publisher must provide. At its discretion, the State Board of Education (SBOE) may remove from consideration any materials proposed for adoption that were not properly deposited with the ESCs, the Texas Education Agency (TEA), or members of the state review panel.

(d) Three official sample copies of each student and teacher component of an instructional materials submission shall be filed with the TEA on or before the date specified in the schedule for the adoption process. Price information required by the commissioner of education shall be included in each sample. In addition, the publisher shall provide a complete description of all items included in a student and teacher component of an instructional materials submission.

(e) One sample copy of each student and teacher component of an instructional materials submission shall be filed with each member of the appropriate state review panel on or before the date specified in the schedule for the adoption process. To ensure that the evaluations of state review panel members are limited to student and teacher components submitted for adoption, publishers shall not provide ancillary materials, supplementary materials, or descriptions of ancillary or supplementary materials to state review panel members.

(f) The TEA, ESCs, and affected publishing companies shall work together to ensure that hardware or special equipment necessary for review of any item included in a student and/or teacher component of an instructional materials submission is available in each ESC. Affected publishers may be required to loan such hardware or special equipment to any member of a state review panel who does not have access to the necessary hardware or special equipment.

(g) A publisher shall provide a list of all corrections necessary to each student and teacher component of an instructional materials submission. The list must be in a format designated by the commissioner of education and filed on or before the deadline specified in the schedule for the adoption process. If no corrections are necessary, the publisher shall file a letter stating this on or before the deadline in the schedule for submitting the list of corrections. On or before the deadline for submitting lists of corrections, publishers shall submit certification that all instructional materials have been edited for accuracy, content, and compliance with requirements of the proclamation.

(h) Three complete sample copies of each student and teacher component of adopted instructional materials that incorporate all corrections required by the SBOE shall be filed with the commissioner of education on or before the date specified in the schedule for the adoption process. In addition, each publisher shall file an affidavit signed by an official of the company verifying that all corrections required by the commissioner of education and SBOE have been made. Corrected samples shall be identical to materials that will be provided to school districts after purchase.

(i) Publishers participating in the adoption process are responsible for all expenses incurred by their participation. The state does not guarantee return of sample instructional materials.

This agency 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 July 26, 2002.

TRD-200204621
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: September 1, 2002
Proposal publication date: May 24, 2002
For further information, please call: (512) 463-9701

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CHAPTER 101. ASSESSMENT
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §101.3

The State Board of Education (SBOE) adopts new §101.3, concerning the statewide assessment program, without changes to the proposed text as published in the April 26, 2002, issue of the *Texas Register* (27 TexReg 3420) and will not be republished.

The new section describes, in general, SBOE policy relating to the statewide assessment program in accordance with the Texas Education Code (TEC), Chapter 39, Subchapter B.

No comments were received regarding adoption of the new section.

The new section is adopted under the Texas Education Code (TEC), Chapter 39, Subchapter B, which authorizes the State Board of Education to adopt rules to create and implement a statewide assessment 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 July 26, 2002.

TRD-200204622

Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Effective date: August 15, 2002
Proposal publication date: April 26, 2002
For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §§213.1 - 213.26, 213.30 - 213.33

The Board of Nurse Examiners for the State of Texas adopts the repeal of 22 TAC §§213.1 - 213.26 and §§213.30 - 213.33. These rules concern the Practice and Procedure of the Board of Nurse Examiners and are being repealed concomitant with new §§213.1 - 213.26 and §§213.30 - 213.33. The proposed repeal was published on May 3, 2002, issue of the *Texas Register* (27 TexReg 3692). This adopted repeal is being done pursuant to the Board's rule review published in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2845).

The Board of Nurse Examiners reviewed the rules governing practice and procedure and determined that some of the sections of the existing rule warranted clarification, simplification, updating, and changes to address certain provisions which were found to be inadequate in application. The review required implementation of wording that more accurately reflected the current statutory provisions, and complied with amendments to existing laws and new statutes and rules which have been enacted since chapter 213's last adoption. As a result, the Board of Nurse Examiners has determined that the repeal of the current sections are warranted.

The adopted repeal of §§213.1 - 213.26 and §§213.30 - 213.33 is made subject to §2001.039 of the Texas Government Code requiring rule review within four years of the date of a rule's adoption. This repeal is intended to comply with the requisite review of Chapter 213.

No comments were received in response to the proposed repeal of these sections.

The repeal is adopted pursuant to the Texas Occupations Code §301.151 which authorizes the board to adopt rules necessary for the performance of its duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204669
Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective date: August 15, 2002
Proposal publication date: May 3, 2002
For further information, please call: (512) 305-6823

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22 TAC §§213.1 - 213.26, 213.30 - 213.33

The Board of Nurse Examiners for the State of Texas (Board) adopts new 22 TAC §§213.1 - 213.26 and §§213.30 - 213.33 with changes to the proposed text as published in the May 3, 2002, issue of the *Texas Register* (27 TexReg 3692). These rules concern the Practice and Procedure of the Board of Nurse Examiners and are being adopted concomitant with the repeal of the current §§213.1 - 213.26 and §§213.30 - 213.33. This adoption is being done pursuant to the Board's rule review published in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2845).

The Board of Nurse Examiners reviewed the rules governing practice and procedure and determined that some of the sections of the existing rule warranted clarification, simplification, updating, and changes to address certain provisions which were found to be inadequate in application. The review of these sections required implementation of wording that more accurately reflected the current statutory provisions, and complied with amendments to existing laws and new statutes and rules which have been enacted since chapter 213's last adoption. The Board updated the current sections with applicable Administrative Procedure Act (APA) statutes, the newly adopted State Office of Administrative Hearings' (SOAH) rules, and the Texas Rules of Civil Procedure. The language was also broadened to include the multistate language in chapter 304 of the Texas Occupations Code (Nurse Licensure Compact). Additionally, the enabling statutes, other state agencies, the Administrative Law Handbook, and other state nursing board rules were reviewed for applicability and wording. As a result, the Board of Nurse Examiners has determined that the adoption of the current sections are warranted.

The Board adopts new §§213.1 - 213.26 and §§213.30 - 213.33 with some changes to the new sections. The General Counsel for the Board advises that the changes in the adopted rules affect no new persons, entities, or subjects. Accordingly, republication of the adopted sections as proposed amendments is not required.

No one commented on the repeal of §§213.1 - 213.26 and §§213.30 - 213.33. The following entities and individuals furnished comments on the proposed new §§213.1 - 213.26 and §§213.30 - 213.33: Joani Bishop, Manager of Claims Division of the Comptroller of Public Accounts office, Ms. Doreen Bartlett, RN, JD, of Houston, Texas; Ms. Taralynn R. Mackay, RN, JD, of Austin, Texas; and The Texas Nurses Association, hereinafter referred to as TNA, through its General Counsel/Director of Governmental Affairs, James H. Willmann, J.D.

Ms. Bishop comments on proposed §213.12 regarding reimbursement of witness fees and expenses and states that the State of Texas Travel Allowance Guide no longer includes provisions for witness fees and expenses.

The Board agrees with this comment and will modify §213.12 to delete the reference to the Travel Guide. The Board will delete two phrases "either the minimum" and ", or the State of Texas Travel Allowance Guide issued by the Comptroller of Public Accounts, whichever is greater."

Ms. Bartlett and Ms. Mackay disagree with changing the response time required by Respondents in disciplinary matters from 30 days to 20 days found in new §213.14(c). Ms. Bartlett states that Respondents need sufficient time to obtain counsel and review documents prior to responding. Ms. Mackay agrees and believes that the short response time will only lead to blanket, non-substantive general denials. Ms. Bartlett states the time

is necessary because the Board has improperly placed the "burden of proof" on the RN to "disprove" the allegations.

The Board disagrees with these comments. The time provided for response is sufficient and is the same time required when responding to contested case discovery, which has never been an obstacle to case resolution. The Board further disagrees that the new rules improperly shift the burden of proof.

Ms. Bartlett, Ms. Mackay, and TNA object to new §213.14 to the extent that an informal default may be entered pursuant to the new rule after a Respondent fails or refuses to answer the notice of complaint. Additionally, Ms. Bartlett states the Board should be required to prove its case by utilizing a non-staff expert even if a Respondent never responds. Further, Ms. Bartlett states that accepting allegations as true is "punitive."

Other than modifying the new §213.14 in response to these comments as outlined below, the Board disagrees with the suggestions of Ms. Bartlett. Utilizing non-staff to review complaints and testify, when the nurse has not even responded, is not factually or economically supportable. Additionally, the comment tends to ignore the duty a RN has to her nursing privilege and the public.

The Board believes that the privilege of holding a RN license carries with it duties to the public. The nurse must maintain a current address with the Board for receipt of official mail and be prepared to timely respond when the Board receives valid complaints. A nurse who refuses to respond should not be rewarded with having new procedural obligations placed on the Board.

Ms. Mackay opposes the new default proceedings sections (§213.1(14) and §213.14(d) - (g)) complaining that §301.463, Texas Occupations Code, requires the initiation of Formal Charges as a prerequisite before any default order can be entered. Similarly, TNA believes that a default based on non-response to a complaint may not be fair or justified since the claim may be "uninvestigated."

The Board agrees with Ms. Mackay, Ms. Bartlett, and the TNA to the extent that a default proceeding is premature based on failure to respond to a complaint as outlined in proposed §213.1(14) and §213.14(d) - (g). In response to these comments the Board has replaced the term "Notice of Complaint" with "Formal Charges" in new §213.1(14). In addition, proposed §213.14(d) - (g) have been deleted from the new rule.

Ms. Mackay and the TNA have not requested deletion of the new provisions relating to default proceedings based on refusal to answer the Formal Charges found in rule §213.16. However, several comments are aimed at making additions in order to clarify the application of these new rules. Ms. Mackay suggests that notice of Formal Charges include the notice that a default order may be entered if the Respondent fails to answer. The Board agrees with Ms. Mackay that a Respondent should be fully apprized of the effect of failing to answer the notice of formal charges and will include the following as a new §213.16(i):

"Any default judgment granted under this section will be entered on the basis of the factual allegations in the formal charges contained in the notice, and upon proof of proper notice to the Respondent. For purposes of this section, proper notice means notice sufficient to meet the provisions of the Texas Government Code §2001.054 and §213.10 of this title (relating to Notice and Service). Such notice shall also include the following language in capital letters in 12 point boldface type:

FAILURE TO FILE A WRITTEN ANSWER TO THE FORMAL CHARGES, EITHER PERSONALLY OR BY LEGAL REPRESENTATIVE, WILL RESULT IN THE ALLEGATIONS CONTAINED IN THE FORMAL CHARGES BEING ADMITTED AS TRUE AND THE PROPOSED RECOMMENDATION OF STAFF SHALL BE GRANTED BY DEFAULT."

TNA criticizes the new §213.22(i)(1) for requiring a Respondent who wishes to set aside a Default Order to demonstrate that the granting of the motion "will occasion no delay or otherwise work an injury to the Board."

The Board disagrees with TNA regarding the new rule requirements for setting aside default orders. The new rule sets out the standard which is well supported by case law in the area of default proceedings. *See* Anderson v. Railroad Comm'n of Texas, 963 S. W.2d 217 (Tex. App. - Austin 1998, no writ) (citing Craddock v. Sunshine Bus Lines, 134 Tex. 388, 133 S.W.2d 124 (1939).

Ms. Mackay and TNA request that additional provisions be included in the new rules which would allow a Respondent who has been defaulted because of failure to answer the Formal Charges be able to appeal such a default to the Board.

The Board agrees that Respondents who can show good cause to set aside a default based on failure to respond to the Formal Charges should be allowed to have such default set aside. Therefore, the Board would add subsection (j) to new §213.16:

(j) A motion for rehearing which requests the Board vacate its default order under this section shall be granted if movant proves by the preponderance of the evidence that the failure to answer the formal charges was not intentional or the result of conscious indifference, but due to accident or mistake--provided that movant has a meritorious defense to the factual allegations contained in the formal charges and the granting thereof will occasion no delay or otherwise work an injury to the Board.

The added language is consistent with the holding of Anderson, supra and Craddock, supra, cited above, and new §213.22(i).

Ms. Mackay requests that §213.5(a) be amended to require Board staff to prefile testimony.

The Board disagrees that this provision is necessary and in most respects if amended as Ms. Mackay suggests, would require the Board to engage in repetitive actions. The Respondent has access to information under the Texas Occupations Code §301.460 and the Board declines to add new information access requirements which are already provided by statute.

Ms. Mackay opposes adoption of new §213.20(h)(1)(B)(ii) and (iii) for reason that it may unreasonably restrict a licensee's access to a hearing if the nurse's failure to abide by a peer assistance agreed order is not the nurse's fault.

The Board disagrees. This new rule is designed to prevent the collateral attack on a valid enforceable order and prevent the re-litigation of underlying facts and stipulations which have been agreed to by the parties. The Board believes the new rule will encourage the good recovery for those nurses seeking peer assistance.

TNA comments that the new definition for "conviction" contained in new §213.13(c)(1) and §213.30(f)(1) is inconsistent with the term used in the Nursing Practice Act.

The Board disagrees. The Board may take disciplinary action or refuse to license a nurse who has been convicted of a felony or misdemeanor involving moral turpitude. See Texas Occupations Code §301.452(b)(3) and chapter 53. The Board's inquiry into

criminal conduct does not end here. Additionally, a nurse is subject to discipline or a person is ineligible for licensure who has engaged in unprofessional conduct. See id. §301.452(b)(10). The Board must review criminal conduct which is injurious to patients and the public even though there is no conviction because such conduct speaks to a person's professional character to practice nursing safely. Frequently, the criminal justice system will obtain an admission from the defendant to felony violations but thereafter will defer the conviction until stringent supervised probation is successfully completed. If the Board were interested only in convictions, nurses and applicants would avoid disclosing admissions to unprofessional conduct relevant to professional character. The new rule is designed to obtain information not only of convictions, but other evidence of unprofessional conduct which may not have resulted in an adjudication of guilt. The new rule does not confuse the distinction between conviction and deferred adjudication. To the contrary, the new rule is designed to clarify the distinction and to assure that the Board obtains all relevant character information.

TNA opposes the new definition of "minor incident" found in new §213.1(25) because TNA believes a new standard has been created.

The Board disagrees, new §213.1(25) has not changed the definition of minor incident other than to correct a prior error citation to the minor incident rules contained in §217.16.

TNA proposes adding a definition for "moral turpitude."

The Board disagrees that a definition of moral turpitude is necessary given its ubiquitous use throughout Texas regulations and statutes.

TNA recommends changing new §213.13(a) by exchanging the word "should" with "if available," or "if reasonably available."

The Board does not agree that the suggested change would add clarity to the new rule.

TNA believes new §213.15(c) does not go far enough in providing information to a nurse who has received a Notice of Complaint. TNA believes the nurse should receive information advising the nurse of his or her rights and what rules will govern the disciplinary process. Further, the TNA believes the nurse should be informed of her right to obtain an attorney.

The Board agrees that the nurse has a right to be represented and needs to be aware of all his or her rights in a disciplinary proceeding. The Board declines to impose the changes suggested by TNA to new §213.15(c). As a license holder in a highly regulated area, nurses must be assumed to be knowledgeable of the regulations affecting their practice. The Board must statutorily provide detailed notice to the nurse in a disciplinary proceeding and must reasonably cite the statutes and rules it believes a nurse has violated. The Board, however, cannot represent the nurse and should not be required to educate a Respondent in matters of which they already should be aware. The information and rules controlling the disciplinary process is freely available on the Internet or by specific written request.

TNA has questioned the appropriate use of request for admissions in disciplinary proceedings outlined in new §213.17(b).

However, the Board disagrees with TNA and believes request for admissions are a reasonable tool for discovery which the Board has authority to adopt by rule pursuant to §301.458(d), Texas Occupations Code.

TNA questions the effect on public records for a disciplined nurse that will result from implementing new §213.24. The Board can neither agree or disagree with TNA's comment and declines to amend new §213.24.

TNA requests the Board re-review new §213.30(f) and reevaluate the limit placed on the Board's discretion to review a petition for licensure. TNA wonders if the Board intends to bar a petitioner "regardless of the circumstances."

The Board agrees with the TNA and replaces "shall" with "should" to enable the Board to exercise discretion in situations where the evidence seems to support present good professional character.

Ms. Bartlett, Ms. Mackay and the TNA comment that §213.20(d)(4) should not be implemented for reason that it would have a chilling effect on the informal settlement process and would make the process less effective. New §213.20(d)(4) would allow Respondent's admissions and the outline notes made during the informal conference be used in the contested case proceeding should an agreed order process fail.

The Board agrees that the use of Respondent's admissions may have a chilling effect on the informal conference. However, the Board's mission to protect the public outweighs the interests of any one person. To potentially be precluded from the information provided by Respondent because it was disclosed during a settlement conference is not supported by public protection policy. It may be that the Respondent is the only party with personal knowledge of the facts and circumstances. The use of settlement conference admissions and notes in the contested case is well recognized and recommended. See 2002 Administrative Law Handbook, Office of the Attorney General, page 25, Figure 5: Informal Conference Procedures. In fairness to the Respondent, the Board believes that a Respondent should be fully apprized of these procedures prior to the settlement conference and, therefore, has adopted the procedure to be implemented by rule.

Finally, the Board replaced the phrase "good moral character" with "good professional character" to coincide with the language of the Nursing Practice Act.

The adoption of new §§213.1- 213.26 and §§213.30 - 213.33 is made subject to §2001.039 of the Texas Government Code requiring rule review within four years of the date of a rule's adoption. This adoption is intended to comply with the requisite review of Chapter 213.

The new sections are adopted pursuant to Texas Occupations Code §301.151 which authorizes the Board to propose rules necessary for the performance of its duties.

§213.1. 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 Nursing Practice Act or NPA, Texas Occupations Code Annotated §§301.001 - 301.607; 303.001 - 304.014.

(2) Address of record--The address of each licensee as provided to the Board of Nurse Examiners (as required by Board rules relating to Change of Name and/or Address) and currently found in §217.7 of this title (relating to Change of Name and/or Address).

(3) Administrative Law Judge or judge--An individual appointed by the chief administrative law judge of the State Office of Administrative Hearings to preside over administrative hearings pursuant to Texas Government Code Annotated, Chapter 2003, §2003.041.

The term shall also include any temporary administrative law judge appointed by the chief administrative law judge pursuant to Texas Government Code Annotated §2003.043.

(4) Adverse licensure action--Any action to fine, reprimand, warn, limit, probate, revoke, suspend, or otherwise discipline a license or multistate licensure privilege. The term includes an order accepting a voluntary surrender in lieu of disciplinary action.

(5) Answer--A responsive pleading.

(6) APA--Administrative Procedure Act, Texas Government Code Annotated Chapter 2001.

(7) Attorney of record--A person licensed to practice law in Texas who has provided the staff with written notice of representation.

(8) Board--The Board of Nurse Examiners appointed pursuant to Texas Occupations Code Annotated §301.051. For purposes of this section, "Board" also includes a three member standing committee designated by the Board to determine matters of eligibility for licensure and discipline of licensees.

(9) Client--See Patient.

(10) Complaint--Written accusations made by any person, or by the Board on its own initiative, alleging that a licensee's conduct may have violated the NPA.

(11) Contested case--A proceeding including, but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing.

(12) Conviction--The result of a criminal proceeding wherein an individual, based on a plea or verdict, is adjudged guilty of the offense charged, or has been placed on probation with or without an adjudication of guilt, or has received an order of deferred adjudication.

(13) Declaratory order--An order, issued by the Board pursuant to Texas Occupations Code Annotated §301.257, determining the eligibility of an individual for initial licensure as a registered nurse and setting forth both the basis for potential ineligibility and the Board's determination of the disclosed eligibility issues.

(14) Default proceeding--The issuance of a proposal for decision or an order in which the factual allegations against the respondent in a contested case are deemed admitted as true upon the respondent's failure to appear at a properly noticed hearing, or failure to file a response to the Formal Charges.

(15) Eligibility and Disciplinary Committee--A three member committee organized in accordance with §211.6 of this title (relating to Agreements in Writing) and authorized by the Board to make a final disposition of licensure eligibility and disciplinary matters including temporary suspension.

(16) Eligibility matter--A proceeding by which an individual requests licensure (such as by Petition for Declaratory Order, Application for Examination, Application for Endorsement), Reinstatement, Reissuance, or Renewal.

(17) Executive director--The executive director of the Board of Nurse Examiners.

(18) Formal charges--Pleading of the staff publicly alleging the reasons for disciplinary actions against a registered nurse created in accordance with Texas Occupations Code Annotated §301.458.

(19) Hearing--A public adjudicative proceeding at the State Office of Administrative Hearings.

(20) Informal conference--A non-public settlement meeting conducted by the executive director or designee to resolve a disciplinary or eligibility matter pending before the Board.

(21) Initial licensure--The original grant of permission to practice professional nursing in Texas, regardless of the method through which licensure was sought.

(22) License--Includes the whole or part of any Board permit, certificate, approval, registration, or similar form of permission required by law to practice professional nursing in the State of Texas. For purposes of this subchapter, the term includes a multistate licensure privilege.

(23) Licensee--A person who has met all the requirements to practice as a registered nurse pursuant to the Nursing Practice Act and the Rules and Regulations relating to Professional Nurse Education, Licensure and Practice and has been issued a license to practice professional nursing in Texas. For purposes of this subchapter, the term includes a person who practices pursuant to a multistate licensure privilege.

(24) Licensing--Includes the Board's process with respect to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, amendment of a license, or multistate licensure privilege.

(25) Minor Incident--Conduct in violation of the Nursing Practice Act, which after a thorough evaluation of factors enumerated under §217.16 of this title (relating to Minor Incidents), indicates that the nurse's continuing to practice professional nursing does not pose a risk of harm to a client or other person and, therefore, does not need to be reported to the Board or peer review committee.

(26) Multistate Licensure Privilege--*See* Texas Occupations Code Annotated §304.001, article 1(h) (definition of Multistate Licensure Privilege). For purposes of this subchapter, the multistate licensure privilege means the privilege to practice as a professional nurse in the state of Texas based on the current, official authority to practice as a registered nurse in another state that has enacted the Nurse Licensure Compact, Texas Occupations Code Annotated Chapter. 304.

(27) Order--A written decision of the Board, regardless of form, signed by the Board or the executive director on its behalf.

(28) Party--A person who holds a license issued by the Board of Nurse Examiners or multistate licensure privilege, a person who seeks to obtain, retain, modify his or her license, or a multistate licensure privilege, or the Board of Nurse Examiners.

(29) Patient--An individual under the care and treatment of a health care professional either at a health care facility or in his/her own home.

(30) Person--Any individual, representative, corporation, or other entity, including any public or non-profit corporation, or any agency or instrumentality of federal, state, or local government.

(31) Petitioner--A party, including the staff, who brings a request or action and assumes the burden of going forward with an administrative proceeding, e.g., the staff in an action to discipline a licensee, the person who seeks reinstatement of a license, or the person who seeks a determination of eligibility for licensure.

(32) Pleading--A written document submitted by a party, or a person seeking to participate in a case as a party, which requests procedural or substantive relief, makes claims, alleges facts, makes legal argument, or otherwise addresses matters involved in the case.

(33) Reinstatement--The process of reissuing and restoring a license to active status that has been previously suspended, revoked, or voluntarily surrendered.

(34) Respondent--A party, including the staff, to whom a request is made or against whom an action is brought, e.g., the licensee in a disciplinary action by the staff, the person who holds a multistate licensure privilege in a disciplinary action by the staff, the Board in a reinstatement action, or the Board in an action to determine eligibility for licensure.

(35) Rule--Any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of a state agency. The term includes the amendment or repeal of a prior rule, and does not include statements regarding only the internal management or organization of any agency and not affecting private rights or procedures.

(36) SOAH--The State Office of Administrative Hearings.

(37) Staff--The staff of the Board, not including the executive director. For purposes of these rules, the staff may act through the legal counsel.

(38) Technical error--A judge's misinterpretation or misapplication of sound nursing principles or minimum nursing practice standards in a proposal for decision that must be corrected to sufficiently protect the public.

§213.2. Construction.

(a) Unless otherwise expressly provided, the past, present or future tense shall each include the other; the masculine, feminine, or neuter gender shall each include the other; and the singular and plural number shall each include the other.

(b) These rules apply to all contested cases within the Board's jurisdiction and shall control practice and procedure before the Board and SOAH, unless pre-empted by rules promulgated by SOAH.

(c) Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed otherwise.

(d) A reference in statute revised by the Texas Occupations Code is considered to be a reference to the part of the Texas Occupations Code that revises that statute or part of statute.

(e) A reference in a rule or part of a rule revised by this subchapter is considered to be a reference to the part of this subchapter that revises that rule or part of that rule.

§213.3. Pleading.

(a) In disciplinary matters:

(1) In actions by the staff as petitioner against a licensee, the staff's pleading shall be styled "Formal Charges."

(2) Except in cases of temporary suspension and injunction, formal charges shall be filed only after notice of the facts or conduct alleged to warrant the intended action has been sent to the licensee's address of record and the licensee has an opportunity to show compliance with the law for retention of the license as provided in the APA, Texas Government Code §2001.054(c).

(b) In nondisciplinary matters:

(1) In actions by the staff as petitioner to enforce and regulate matters the staff's pleading shall ordinarily be styled "Petition of the Board of Nurse Examiners."

(2) In actions by a person as petitioner, e.g., an individual seeking a determination of eligibility for licensure, examination or licensure applicant, or an individual seeking reinstatement of a surrendered, revoked, or suspended license, the person's pleading shall be styled "Petition of NAME." The person shall have the burden of initiating the action, going forward with the administrative proceeding and proving the allegations contained in the pleading. The Board at its discretion, may initiate proceedings before SOAH without relieving petitioner of the burden of proof as outlined herein. If the Board has provided the petitioner with written notice of the basis of its refusal or denial of license, permit, application or petition, the Board may file an answer incorporating this notice and may rely on the notice as a responsive pleading.

§213.4. Representation.

(a) A person may represent himself/herself or be represented by an attorney licensed to practice law in Texas.

(b) A party's attorney of record shall remain the attorney of record in the absence of a formal request to withdraw and an order of the judge approving the request.

(c) Notwithstanding the above, a party may expressly waive the right to assistance of counsel.

§213.5. Appearance.

(a) Any person appearing before the Board in connection with a contested case shall prefile written testimony at least 21 days prior to the appearance.

(b) In disciplinary and eligibility matters, appearances in contested cases may be made only by a party.

(c) In disciplinary and eligibility matters, a non-party may file an amicus brief with the executive director, with contemporaneous filing at SOAH if SOAH has acquired jurisdiction. Non-parties who file under this provision must disclose:

(1) their identities including name, address, telephone number, licensure, certification status;

(2) their interest in the disciplinary or eligibility matter;

(3) the identity of their members, subscribers, clients, constituents;

(4) the identity of the persons or entities that may be benefitted by the position taken by the amicus;

(5) the identity of the persons or entities that may be injured or disadvantaged by the position taken by the amicus; and

(6) the financial impact of the position taken by the amicus.

§213.6. Agreements in Writing.

Unless otherwise provided by the NPA or these rules, no agreement between attorneys or parties concerning any action or matter pending before the Board will be enforced unless it is in writing, signed, and filed with the papers as a part of the record, or unless it is made in open hearing and entered on record.

§213.7. Final Disposition.

Except for matters expressly delegated to the executive director, no agreed order regarding eligibility or discipline shall be final or effective until approved by the Board.

§213.8. Filing of Documents.

(a) The original of all applications, petitions, complaints, motions, protests, replies, answers, notices, and other pleadings relating

to any proceeding pending or to be instituted before the Board shall be filed with the executive director or designee. The date of filing is the date of actual receipt at the office of the Board.

(b) The original of all documents are to be filed at SOAH only after it acquires jurisdiction. (See §213.22(a) of this title (relating to Formal Proceedings) and SOAH rules, 1 TAC §155.7 (relating to Jurisdiction)). Filings and service to SOAH shall be directed to: Docket Division, State Office of Administrative Hearings, 300 West 15th Street, Room 504, P.O. Box 13025, Austin, Texas 78711-3025. Copies of all documents filed at SOAH must be contemporaneously served on the Board.

§213.9. Computation of Time.

(a) In computing any period of time prescribed or allowed by these rules, by order of the Board, or by any applicable statute, the day of the act, event, or default which the designated period of time begins to run is not to be included. The last day of the period is to be included, unless it is a Saturday, Sunday, an official State holiday, or another day on which SOAH or the Board office is closed, in which case the time period will be deemed to end on the next day that SOAH or the Board office is open. When these rules specify a deadline or set a number of days for filing documents or taking other actions, the computation of time shall be by calendar days rather than business days, unless otherwise provided for by these rules, applicable law, SOAH rules, or judge order. However, if the period specified is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted.

(b) Extension. When by these rules, SOAH rules, or judge order, an act is required or allowed to be done at or within a specified time, the executive director or judge (if SOAH has acquired jurisdiction) may, for cause shown, order the period enlarged if application is made before the expiration of the specified period. In addition, where good cause is shown for the failure to act within the specified time period, the executive director or the judge may permit the act to be done after the expiration of the specified period.

§213.10. Notice and Service.

(a) Notice must be in writing and addressed to the party. Notice to a licensee is effective and service is complete when sent by certified or registered mail, return receipt requested, to the licensee's address of record at the time of the mailing.

(b) Notice to a party holding a multistate licensure privilege is effective and service is complete when sent by certified or registered mail, return receipt requested, to the privilege holder's address of record maintained with the home state registered nurse licensing agency at the time of the mailing.

(c) Notice to a non-licensee is effective and service is complete when sent by certified or registered mail, return receipt requested, to the person's address as stated on his/her petition, application, or other pleading.

(d) Notice to any person other than the Board is effective and service is complete when sent by certified or registered mail, return receipt requested, to the person's attorney of record.

(e) Notice of a hearing in a contested case must comply with Texas Government Code §2001.052 (Texas Administrative Procedure Act). Service is complete when made pursuant to 1 TAC §155.25 (SOAH).

§213.11. Non-SOAH Motion for Continuance.

(a) No continuance shall be granted except for sufficient cause supported by affidavit as detailed in subsection (b) of this section, by consent of the parties, or by operation of law. A party that files a motion for continuance fewer than 10 days before the date of the event specified in any non-SOAH notice, must contact the other party and indicate in the motion whether there is any opposition to the motion.

(b) The motion shall be supported by a sworn affidavit detailing the reasons for the continuance. The affidavit shall also set forth the specific grounds upon which the party seeks the continuance and that the continuance is not sought for delay, but so that justice may be served.

(1) If the ground of such application is the need for testimony, the party requesting the continuance shall make an affidavit stating that such testimony is material, shall show the materiality thereof, shall state that he or she has used due diligence to procure such testimony, stating such diligence, and shall state the cause of failure, if known, and shall state that such testimony cannot be procured from any other source.

(2) If it be for the absence of a witness, the party requesting the continuance shall state the name and residence of the witness, and what the party requesting the continuance expects to prove by such witness.

(3) If it be for the reason of a conflicting setting, the party requesting the continuance shall identify the conflict by style, cause number, court, agency, nature of setting, and date the conflicting setting was made.

§213.12. Witness Fees and Expenses.

A witness who is not a party to the proceeding and who is subpoenaed to appear at a deposition or hearing or to produce books, papers, or other objects, shall be entitled to receive reimbursement for expenses incurred in complying with the subpoena as set by the legislature in the APA, Texas Government Code Annotated §2001.103.

§213.13. Complaint Investigation and Disposition.

(a) Complaints shall be submitted to the Board in writing and should contain at least the following information: RN/Respondent Name, License Number, Social Security Number, Date of Birth, Employer, Dates of Occurrence(s), Description of Facts or Conduct, Witnesses, Outcome, Complainant Identification (Name, Address, and Telephone Number), and Written Instructions For Providing Information to the Board. Complaints may be made on the agency's complaint form.

(b) A preliminary investigation shall be conducted to determine the identity of the person named or described in the complaint.

(c) Complaints shall be assigned a priority status:

(1) Priority 1--those indicating that credible evidence exists showing a guilty plea, with or without an adjudication of guilt, or conviction of a serious crime involving moral turpitude; a violation of the NPA involving actual deception, fraud, or injury to clients or the public or a high probability of immediate deception, fraud or injury to clients or the public;

(2) Priority 2--those indicating that credible evidence exists showing a violation of the NPA involving a high probability of potential deception, fraud, or injury to clients or the public;

(3) Priority 3--those indicating that credible evidence exists showing a violation of the NPA involving a potential for deception, fraud, or injury to clients or the public; and

(4) Priority 4--all other complaints.

(d) Not later than the 30th day after a complaint is received, the staff shall place a time line for completion, not to exceed one year, in the investigative file and notify all parties to the complaint. Any change in time line must be noted in the file and all parties notified of

the change not later than seven days after the change was made. For purposes of this rule, completion of an investigation in a disciplinary matter occurs when:

(1) staff determines insufficient evidence exists to substantiate the allegation of a violation of the NPA, Board's rules, or a Board order; or

(2) staff determines sufficient evidence exists to demonstrate a violation of the NPA, Board's rules, or a Board order and drafts proposed formal charges.

(e) Staff shall conduct a criminal background search of the party described in the complaint.

(f) The staff shall provide summary data of complaints extending beyond the complaint time line to the executive director.

§213.14. Preliminary Notice to Respondent in Disciplinary Matters.

(a) Except for proceedings conducted pursuant to the authority of Texas Occupations Code Annotated §301.455 (Temporary Suspensions) or unless it would jeopardize the investigation, prior to commencing disciplinary proceedings under §213.15 of this title (relating to Commencement of Disciplinary Proceedings), the staff shall serve the respondent with written notice in accordance with Texas Government Code §2001.054(c).

(b) Such notice shall contain a statement of the facts or conduct alleged to warrant an adverse licensure action. The notice shall invite the respondent to show compliance with all requirements of the law for retention of the license.

(c) Respondent shall file a written response within 20 days after service of the notice specified in subsection (a) of this section.

§213.15. Commencement of Disciplinary Proceedings.

(a) If a complaint is not resolved informally, the staff may commence disciplinary proceedings by filing formal charges.

(b) The formal charges shall contain the following information:

(1) the name of the respondent and his or her license number;

(2) a statement alleging with reasonable certainty the specific act or acts relied on by the Board to constitute a violation of a specific statute, Board rule, or Board order; and

(3) a reference to the section of the Act or to the Board's rule, regulation, or order which respondent is alleged to have violated.

(c) When formal charges are filed, the executive director shall serve respondent with a copy of the formal charges. The notice shall state that respondent shall file a written answer to the formal charges that meets the requirements of §213.16 of this title (relating to Respondent's Answer in a Disciplinary Matter).

(d) The staff may amend the formal charges at any time permitted by the APA. A copy of any formal amended charges shall be served on the respondent. The first charges filed shall be entitled "formal charges," the first amended charges filed shall be entitled "first amended formal charges," and so forth.

(e) Formal charges may be resolved by agreement of the parties at any time.

§213.16. Respondent's Answer in a Disciplinary Matter.

(a) The respondent in a disciplinary matter shall file an answer to the formal charges and to every amendment thereof.

(b) The answer shall admit or deny each of the allegations in the charges or amendment thereof. If the respondent intends to deny only a part of an allegation, the respondent shall specify so much of it is true and shall deny only the remainder. The answer shall also include any other matter, whether of law or fact, upon which respondent intends to rely for his or her defense.

(c) If the Respondent fails to file a response to the Formal charges, the matter will be considered as a default case

(d) In a case of default, the Respondent will be deemed to have

(1) admitted all the factual allegations in the Formal charges;

(2) waived the opportunity to show compliance with the law;

(3) waived the opportunity for a hearing on the Formal charges; and

(4) waived objection to the recommended sanction in the Formal charges.

(e) The Executive Director may recommend that the Board enter a default order, based upon the allegations set out in the Formal charges, that adopts the sanction that was recommended in the Formal charges.

(f) Upon consideration of the case, the Board may:

(1) enter a default order under §2001.056 of the APA; or

(2) order the matter to be set for a hearing at SOAH.

(g) The respondent may amend his or her answer at any time permitted by the APA or SOAH rules.

(h) The first answer filed shall be entitled "answer," the first amended answer filed shall be entitled "first amended answer," and so forth.

(i) Any default judgment granted under this section will be entered on the basis of the factual allegations in the formal charges contained in the notice, and upon proof of proper notice to the Respondent. For purposes of this section, proper notice means notice sufficient to meet the provisions of the Texas Government Code §2001.054 and §213.10 of this title (relating to Notice and Service). Such notice shall also include the following language in capital letters in 12 point boldface type: FAILURE TO FILE A WRITTEN ANSWER TO THE FORMAL CHARGES, EITHER PERSONALLY OR BY LEGAL REPRESENTATIVE, WILL RESULT IN THE ALLEGATIONS CONTAINED IN THE FORMAL CHARGES BEING ADMITTED AS TRUE AND THE PROPOSED RECOMMENDATION OF STAFF SHALL BE GRANTED BY DEFAULT.

(j) A motion for rehearing which requests that the Board vacate its default order under this section shall be granted if movant proves by the preponderance of the evidence that the failure to answer the formal charges was not intentional or the result of conscious indifference, but due to accident or mistake--provided that movant has a meritorious defense to the factual allegations contained in the formal charges and the granting thereof will occasion no delay or otherwise work an injury to the Board.

§213.17. Discovery.

(a) Parties to administrative proceedings shall have reasonable opportunity and methods of discovery described in the Texas Administrative Procedure Act (APA), Chapter 2001, Texas Government Code, the Texas Nursing Practice Act (NPA), and SOAH rule, 1 TAC §155.31 (relating to Discovery). Matters subject to discovery are limited to those which are relevant and material to issues within the Board's authority as set out in the NPA. Subject to prior agreement of parties or unless explicitly stated in Board rules, responses to discovery requests,

except for notices of depositions, shall be made within 20 days of receipt of the request.

(b) Parties may obtain discovery by: request for disclosure, as described by Texas Revised Civil Procedures 194, oral or written depositions, written interrogatories to a party; requests of a party for admission of facts and the genuineness of identity of documents and things; requests and motions for production, examination, and copying of documents and other tangible materials; motion for mental or physical examinations; and requests and motions for entry upon and examination of real property.

(c) Parties are encouraged to make stipulations of evidence where possible and to agree to methods and time lines to expedite discovery and conserve time and resources.

§213.18. Depositions.

(a) The deposition of any witness may be taken upon a commission issued by the executive director upon the written request of any party, a copy of which shall be served on the non-requesting party.

(b) The written request shall contain the name, address, and title, if any, of the witness; a description of the books, records, writings, or other tangible items the requesting party wishes the witness to produce at the deposition; the date and location where the requesting party wishes the deposition to be taken; and a statement of the reasons why the deposition should be taken and the items produced.

(c) Depositions may be taken by telephone and by non-stenographic recording. The recording or transcript thereof may be used by any party to the same extent as a stenographic deposition, provided all other parties are supplied with a copy of the recording and the transcript to be used. The witness in a telephonic or non-stenographic deposition may be sworn by any notary. The transcript of such deposition shall be submitted to the witness for signature in accordance with Texas Government Code Annotated §2001.099.

(d) Not withstanding any other provisions of these sections, the executive director may issue a commission to take a deposition prior to the filing of charges under §213.15 of this title (relating to Commencement of Disciplinary Proceedings) if, in the opinion of the executive director, such a commission is necessary for either party to preserve evidence and testimony or to investigate any potential violation or lack of compliance with the Act, the rules and regulations, or orders of the Board. The commission may be to compel the attendance of any person to appear for the purposes of giving sworn testimony and to compel the production of books, records, papers or other objects.

(e) A deposition in a contested case shall be taken in the county where the witness:

(1) resides;

(2) is employed; or

(3) regularly transacts business in person.

§213.19. Subpoenas.

(a) Upon the written request of any party, the executive director may issue a subpoena to require the attendance of witnesses or the production of books, records, papers, or other objects as may be necessary and proper for the purposes of the proceedings.

(b) If the subpoena is for the attendance of a witness, the written request shall contain the name, address, and title, if any, of the witness and the date upon which and the location at which the attendance of the witness is sought. If the subpoena is for the production of books, records, writings, or other tangible items, the written request shall contain a description of the item sought; the name, address, and title, if any, of the person or entity who has custody or control over the items and the date on which and the location at which the items are sought to be produced. Each request, whether for a witness or for production of items, shall contain a statement of the reasons why the subpoena should be issued.

(c) Upon a finding that a party has shown good cause for the issuance of the subpoena, the executive director shall issue the subpoena in the form described in Texas Government Code §2001.089.

(d) Notwithstanding any other provisions of these sections, the executive director may issue a subpoena prior to the filing of formal charges under §213.15 of this title (relating to Commencement of Disciplinary Proceedings), if, in the opinion of the executive director, such a subpoena is necessary to preserve evidence and testimony to investigate any potential violation or lack of compliance with the NPA, the rules and regulations, or orders of the Board. The subpoena may be to compel the attendance of any person to appear for the purposes of giving sworn testimony and/or to compel the production of books, records, papers, or other objects.

§213.20. Informal Proceedings.

(a) Any matter within the Board's jurisdiction may be resolved informally by stipulation, agreed settlement, agreed order, dismissal, or default.

(b) In disciplinary matters, the Board shall offer the complainant and the licensee the opportunity to be heard. The offer may be made at any time prior to disposition and may be included on the Board's complaint form, on any notice required by statute or these rules, or otherwise.

(c) Informal proceedings may be conducted in person, by attorney, or by electronic, telephonic, or written communication.

(d) Informal proceedings shall be conducted pursuant to the following procedural standards:

(1) Respondent shall have a right to be represented by an attorney of record. At any time, should respondent choose to obtain representation by an attorney and advises staff of such choice, the conference will be discontinued;

(2) Respondent will be expected to answer questions concerning the allegations contained in notice of complaint or formal charges, but may decline to answer any questions posed during the conference;

(3) Respondent and staff participation in the conference is voluntary and may be terminated by either party without prejudicing the right to proceed with a contested case. Respondent will be expected to cooperate fully with the Enforcement Staff to ensure that it has all pertinent information relating to the complaint or formal charges against respondent; and

(4) Although, a verbatim transcript is not being kept of the informal conference, party admissions and outline notes may be used at a formal hearing if this matter is docketed as a formal complaint at the State Office of Administrative Hearings.

(e) Informal conferences may be conducted at any time by the executive director or designee.

(f) The Board's counsel or assistant attorney general shall participate in informal proceedings.

(g) Disposition of matters considered informally may be made at any time in an agreed order containing such terms as the executive director may deem reasonable and necessary. Except as to matters delegated to the executive director for ratification, said agreed order shall not be final and effective until the Board, or an eligibility and disciplinary committee, votes to accept the proposed disposition.

(h) Referral to peer assistance after report to the Board.

(1) A nurse required to be reported under Texas Occupations Code Annotated §§301.401 - 301.409, may obtain informal disposition through referral to a peer assistance program as specified in Texas Occupations Code Annotated §301.410, as amended, if the nurse:

(A) makes a written stipulation of the nurse's impairment by dependency on chemicals or by mental illness;

(B) makes a written waiver of the nurse's right to administrative hearing and judicial review of:

(i) all matters contained in the stipulation of impairment;

(ii) any future modification or extension of the peer assistance contract;

(iii) the future imposition of sanctions under Texas Occupations Code Annotated §301.453 in the event the executive director should determine the nurse has failed to comply with the requirements of the peer assistance program; and

(C) makes a written contract with the Board of Nurse Examiners through its executive director promising to:

(i) undergo and pay for such physical and mental evaluations as the executive director or the peer assistance program determine to be reasonable and necessary to evaluate the nurse's impairment; to plan, implement and monitor the nurse's rehabilitation; and, to determine if, when and under what conditions the nurse can safely return to practice;

(ii) sign a participation agreement with the peer assistance program;

(iii) comply with each and every requirement of the peer assistance program in full and timely fashion for the duration of the contract and any extension(s) thereof; and

(iv) waive confidentiality and privilege and authorize release of information about the nurse's impairment and rehabilitation to the peer assistance program and the executive director of the Board of Nurse Examiners.

(2) Disposition of a complaint by referral to a peer assistance program is not a finding which requires imposition of a sanction under Texas Occupations Code Annotated §301.453.

(3) In the event the nurse fails to comply with the nurse's contract with the Board of Nurse Examiners or the nurse's participation agreement with the peer assistance program, such non-compliance will be considered by the executive director at an informal proceeding after notice to the nurse of the non-compliance and opportunity to respond. At the informal proceeding, the executive director may consider facts relevant to the alleged non- compliance, modify or extend the contract or participation agreement, declare the contract satisfied or impose §301.453 sanctions on the nurse which will result in public discipline and reporting to the National Council of State Boards of Nursing's Disciplinary Data Bank.

(i) If eligibility matters are not resolved informally, the petitioner may obtain a hearing before SOAH by submitting a written request to the staff.

(j) If disciplinary matters are not resolved informally, formal charges may be filed in accordance with §213.15 of this title (relating to Commencement of Disciplinary Proceedings) and the case may be set for a hearing before SOAH in accordance with §213.22 of this title (relating to Formal Proceedings).

(k) Pre-docketing conferences may be conducted by the executive director prior to SOAH acquiring jurisdiction over the contested case. The executive director, unilaterally or at the request of any party, may direct the parties, their attorneys or representatives to appear before the executive director at a specified time and place for a conference prior to the hearing for the purpose of:

(1) simplifying the issues;

(2) considering the making of admissions or stipulations of fact or law;

(3) reviewing the procedure governing the hearing;

(4) limiting the number of witnesses whose testimony will be repetitious; and

(5) doing any act that may simplify the proceedings, and disposing of the matters in controversy, including settling all or part of the issues in dispute pursuant to §213.20 and §213.21 of this title (Informal Proceedings and Agreed Disposition).

§213.21. Agreed Disposition.

Informal proceedings, complaints and formal charges may be resolved by stipulation, agreed settlement, agreed order, or dismissal pursuant to Texas Occupations Code Annotated §301.463.

§213.22. Formal Proceedings.

(a) Formal administrative hearings in contested cases shall be conducted in accordance with the APA and SOAH rules. Jurisdiction over the case is acquired by SOAH when the staff or respondent files a Request to Docket Case Form accompanied by legible copies of all pertinent documents, including but not limited to the complaint, petition, application, or other document describing the agency action giving rise to a contested case.

(b) When a case has been docketed before SOAH, Board staff or respondent shall provide a notice of hearing to all parties in accordance with §2001.052, Texas Government Code, and applicable SOAH rules.

(c) In disciplinary cases, the respondent shall enter an appearance by filing a written answer or other responsive pleading with SOAH, with a copy to staff, within 20 days of the date on which the notice of hearing is served to the respondent.

(d) For purposes of this section, an entry of an appearance shall mean the filing of a written answer or other responsive pleading.

(e) The failure of the respondent to timely enter an appearance as provided in this section shall entitle the staff to a continuance at the time of the hearing in the contested case for such reasonable period of time as determined by the judge.

(f) The notice of hearing provided to a respondent for a contested case shall include the following language in capital letters in 12-point bold face type: FAILURE TO ENTER AN APPEARANCE BY FILING A WRITTEN ANSWER OR OTHER RESPONSIVE PLEADING TO THE FORMAL CHARGES WITHIN 20 DAYS OF THE DATE THIS NOTICE WAS MAILED, SHALL ENTITLE THE STAFF TO A CONTINUANCE AT THE TIME OF THE HEARING.

(g) If a respondent fails to appear in person or by attorney on the day and at the time set for hearing in a contested case, regardless of whether an appearance has been entered, the judge, pursuant to SOAH's rules, shall, upon adequate proof that proper notice under the APA and SOAH rules was served upon the defaulting party, enter a default judgment in the matter adverse to the respondent. Such notice shall have included in 12-point, bold faced type, the fact that upon

failure of the party to appear at the hearing, the factual allegations in the notice will be deemed admitted as true and the relief sought in the proposed recommendation by the staff shall be granted by default.

(h) Any default judgment granted under this section will be entered on the basis of the factual allegations in the formal charges contained in the notice of hearing, and upon proof of proper notice to the respondent. For purposes of this section, proper notice means notice sufficient to meet the provisions of the Texas Government Code §§2001.051, 2001.052 and 2001.054, as well as §213.10 of this title (relating to Notice and Service). Such notice of hearing also shall include the following language in capital letters in 12-point boldface type: FAILURE TO APPEAR AT THE HEARING IN PERSON OR BY LEGAL REPRESENTATIVE, REGARDLESS OF WHETHER AN APPEARANCE HAS BEEN ENTERED, WILL RESULT IN THE ALLEGATIONS CONTAINED IN THE FORMAL CHARGES BEING ADMITTED AS TRUE AND THE PROPOSED RECOMMENDATION OF STAFF SHALL BE GRANTED BY DEFAULT.

(i) A motion to vacate a default judgment rendered by the judge must be filed within 10 days of service of notice of the default judgment.

(1) The motion to vacate the default judgment shall be granted if movant proves by the preponderance of the evidence that the failure to attend the hearing was not intentional or the result of conscious indifference, but due to accident or mistake, provided that respondent has a meritorious defense to the factual allegations contained in the formal charges and the granting thereof will occasion no delay or otherwise work an injury to the Board.

(2) If the motion to vacate the default judgment is granted, it shall be the responsibility of the parties to either settle the matter informally or to request a rehearing on the merits. Whenever possible, the rehearing of the case shall occur with the judge that heard the default matter.

(j) Because of the often voluminous nature of the records properly received into evidence by the judge, the party introducing such documentary evidence may paginate each such exhibit or flag pertinent pages in each such exhibit in order to expedite the hearing and the decision-making process.

(k) The schedule of sanctions set out in the NPA is adopted by the Board, and the judge shall use such sanctions as well as any sanctions adopted by the Board by rule.

(l) Within a reasonable time after the conclusion of the hearing, the judge shall prepare and serve on the parties a proposal for decision that includes the judge's findings of fact and conclusions of law and a proposed order recommending a sanction to be imposed, if any.

(m) Each hearing may be recorded by a court reporter in accordance with the APA and SOAH rules. The cost of the transcription of the statement of facts shall be borne by the party requesting the transcript and said request shall be sent directly to the court reporter and the requesting party shall notify the other party in writing of the request.

(n) A party who appeals a final decision of the Board shall pay all of the costs of preparation of the original and any certified copy of the record of the proceeding that is required to be transmitted to the reviewing court.

(1) The record in a contested case shall consist of the following:

(A) all pleadings, motions, intermediate rulings;

(B) all evidence received or considered by the judge;

(C) a statement of the matters officially noticed;

(D) questions and offers of proof, objections, and rulings thereon;

(E) proposed findings and exceptions;

(F) any decision, opinion, or report by the judge presiding at the hearing;

(G) all staff correspondence submitted to the judge in connection with his or her consideration of the case; and

(H) the transcribed statement of facts (Q & A testimony) from the hearing unless the parties have stipulated to all or part of the statement of facts.

(2) Calculation of costs for preparation of the record shall be governed by the same procedure utilized by the Board in preparing documents responsive to open records requests pursuant to the Public Information Act. These costs shall include, but not be limited to, the cost of research, document retrieval, copying, and labor.

§213.23. Decision of the Board.

(a) Except as to those matters expressly delegated to the executive director for ratification, either the Board or the Eligibility and Disciplinary Committee, may make final decisions in all matters relating to the granting or denial of a license or permit, discipline, temporary suspension, or administrative and civil penalties.

(b) Any party of record who is adversely affected by the proposal for decision of the judge shall have the opportunity to file exceptions and a brief to the proposal for decision within 15 days after the date of service of the proposal for decision. A reply to the exceptions may be filed by the other party within 15 days of the filing of the exceptions. Exceptions and replies shall be filed with the judge with copies served on the opposing party. The proposal for decision may be amended by the judge pursuant to the exceptions, replies, or briefs submitted by the parties without again being served on the parties.

(c) The proposal for decision may be acted on by the Board, or the Eligibility and Disciplinary Committee, after the expiration of 10 days after the filing of replies to exceptions to the proposal for decision or upon the day following the day exceptions or replies to exceptions are due if no such exceptions or replies are filed.

(d) It is the policy of the Board to change a finding of fact or conclusion of law in a proposal for decision or to vacate or modify the proposed order of a judge when, the Board determines:

(1) that the judge did not properly apply or interpret applicable law, agency rules, written policies provided by staff or prior administrative decisions;

(2) that a prior administrative decision on which the judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

(e) If the Board modifies, amends, or changes the recommended order of the judge, an order shall be prepared reflecting the Board's changes as stated in the record of the meeting and stating the specific reason and legal basis for the changes made according to subsection (d) of this section.

(f) An order of the Board shall be in writing and may be signed by the executive director on behalf of the Board.

(g) A copy of the order shall be mailed to all parties and to the party's last known employer as a professional nurse.

(h) The decision of the Board is immediate, final, and appealable upon the signing of the written order by the executive director on behalf of the Board where:

(1) the Board finds and states in the order that an imminent peril to the public health, safety, and welfare requires immediate effect of the order; and

(2) the order states it is final and effective on the date rendered.

(i) A motion for rehearing shall not be a prerequisite for appeal of the decision where the order of the Board contains the finding set forth in subsection (h) of this section.

(j) Motions for rehearing are controlled by Texas Government Code §2001.145.

§213.24. Rescission of Probation.

(a) At least 20 days prior to a hearing to rescind probation, the probationer shall be served with written notice of the allegations supporting rescission of the probation.

(b) The hearing shall be conducted in accordance with §213.22 of this title (relating to Formal Proceedings), and the decisions of the Board shall be rendered in accordance with §213.23 of this title (relating to Decision of the Board).

(c) After giving the probationer notice and an opportunity to be heard, the Board may set aside the stay order and impose the stayed discipline (revocation/suspension) of the probationer's license.

(d) If during the period of probation, an additional allegation, accusation, or petition is reported or filed against the probationer's license, the probationary period shall not expire and shall automatically be extended until the allegation, accusation, or petition has been acted upon by the Board.

(e) The Board may determine as part of probation that the public may be better protected if probationer is suspended from the practice of nursing for a specific time period in order to correct deficiencies in skills, education, or personal rehabilitation and to assure documented proof of rehabilitation. Prior to the lifting of the actual suspension of license, the probationer will provide documentation of completion of educational courses or treatment rehabilitation.

§213.25. Monitoring.

(a) The Board shall identify and monitor licensees who present a risk to the public and who are subject to Board orders. The monitoring system shall track at least the name, license number, address, employer, and any other information necessary to demonstrate compliance or noncompliance with an order of the Board.

(b) Monitored licensees will pay a monthly fee as stated in the Board order. Said fee shall be paid on or before the 5th of each month.

§213.26. Reissuance of a License.

(a) A person whose license to practice professional nursing in this state has been revoked, suspended, or surrendered may apply for reinstatement of the license. In the case of revocation, petition shall not be made prior to one year after the effective date of the revocation. The Board may approve or deny a petition. In the case of denial, the Board may set a reasonable time that must elapse before another petition may be filed. The Board may impose reasonable conditions that a petitioner must satisfy before reinstatement of an unencumbered license.

(b) A petition for reinstatement shall be in writing and in the form prescribed by the Board.

(c) Petitioner's appearance at any hearing concerning reinstatement of a license shall be in person unless otherwise approved by the executive director.

(d) The burden of proof is on the petitioner to prove present fitness to practice as well as compliance with all terms and conditions imposed as a part of any revocation, surrender, or suspension. A license may be reissued with a limited practice designation or with stipulations. If petition for reinstatement is denied, Petitioner may request a hearing before SOAH.

(e) In considering reinstatement of a surrendered, suspended, or revoked license, the Board will evaluate:

(1) the conduct which resulted in voluntary surrender, suspension, or revocation of the license;

(2) the conduct of the petitioner subsequent to the suspension, revocation, or acceptance of surrender of license;

(3) the lapse of time since suspension, revocation, or acceptance of surrender;

(4) compliance with all conditions imposed by the Board as a prerequisite for issuance of the license; and

(5) the petitioner's present qualification to practice professional nursing based on his or her history of nursing-related employment or education.

§213.30. Declaratory Order of Eligibility for Licensure.

(a) A person enrolled or planning to enroll in an educational nursing program that prepares a person for an initial license as a registered nurse or an applicant who seeks licensure by endorsement pursuant to §217.5 of this title (relating to Temporary License and Endorsement) who has reason to believe that he or she may be ineligible for licensure, may petition the Board for a declaratory order or apply for a license by endorsement as to his or her eligibility.

(b) The person must submit a petition or application on forms provided by the Board which includes:

(1) a statement by the petitioner or applicant indicating the reason(s) and basis of potential ineligibility;

(2) if the potential ineligibility is due to criminal conduct and/or conviction, any court documents including, but not limited to, indictments, orders of deferred adjudication, judgments, probation records and evidence of completion of probation, if applicable;

(3) if the potential ineligibility is due to mental illness, evidence of evaluation, including a prognosis, by a psychologist or psychiatrist, evidence of treatment, including any medication;

(4) if the potential ineligibility is due to chemical dependency including alcohol, evidence of evaluation and treatment, after care and support group attendance; and

(5) the required fee which is not refundable.

(c) An investigation of the petition/application and the petitioner's/applicant's eligibility shall be conducted.

(d) The petitioner/applicant or the Board may amend the petition/application to include additional grounds for potential ineligibility at any time before a final determination is made.

(e) If an applicant under §217.5 of this title has been licensed to practice professional nursing in any jurisdiction and has been disciplined, or allowed to surrender in lieu of discipline, in that jurisdiction, the following provisions shall govern the eligibility of the applicant under §213.27 of this title (relating to Good Professional Character).

(1) A certified copy of the order or judgment of discipline from the jurisdiction is prima facie evidence of the matters contained in such order or judgment, and a final adjudication in the other jurisdiction that the applicant has committed professional misconduct is conclusive of the professional misconduct alleged in such order or judgment.

(2) An applicant disciplined for professional misconduct in the course of nursing in any jurisdiction or an applicant who resigned in lieu of disciplinary action is deemed to not have present good professional character under §213.27 of this title and is therefore ineligible to file an application under §217.5 of this title during the period of such discipline imposed by such jurisdiction, and in the case of revocation or surrender in lieu of disciplinary action, until the applicant has filed an application for reinstatement in the disciplining jurisdiction and obtained a final determination on that application.

(f) If a petitioner's/applicant's potential ineligibility is due to criminal conduct and/or conviction, the following provisions shall govern the eligibility of the applicant under §213.28 of this title (relating to Licensure of Persons with Criminal Convictions):

(1) The record of conviction or order of deferred adjudication is conclusive evidence of guilt.

(2) An individual guilty of a felony under this rule is conclusively deemed not to have present good professional character and fitness and should not petition the Board for a Declaratory Order of Eligibility for Licensure for a period of three years after the completion of the sentence and/or period of probation.

(3) Upon proof that a felony conviction or felony order of probation with or without adjudication of guilt has been set aside or reversed, the petitioner or applicant shall be entitled to a new hearing before the Board for the purpose of determining whether, absent the record of conclusive evidence of guilt, the petitioner or applicant possesses present good professional character and fitness.

(g) If the executive director proposes to find the petitioner or applicant ineligible for licensure, the petitioner or applicant may obtain a hearing before the State Office of Administrative Hearings. The Executive Director shall have discretion to set a hearing and give notice of the hearing to the petitioner or applicant. The hearing shall be conducted in accordance with §213.22 of this title (relating to Formal Proceedings) and the rules of SOAH. When in conflict, SOAH's rules of procedure will prevail. The decision of the Board shall be rendered in accordance with §213.23 of this title (relating to Decision of the Board).

§213.31. Cross-reference of Rights and Options Available to Licensees and Petitioners.

Licensees subject to disciplinary action and petitioners seeking a determination of licensure eligibility have certain rights and options available to them in connection with these mechanisms. For example, licensees or petitioners have the right to request information in the Board's possession, including information favorable to licensee or petitioner, and the option to be represented by an attorney at their own expense. The following is a list of references to provisions of the Nursing Practice Act (Texas Occupations Code Annotated Chapter 301) and the Board's rules addressing these rights and options and related matters. Persons with matters before the Board should familiarize themselves with these provisions:

(1) Section 301.257--Declaratory Order of License Eligibility;

(2) Section 301.203--Records of Complaints;

(3) Section 301. 204--General Rules Regarding Complaint Investigation and Disposition;

(4) Section 301.464--Informal Proceedings;

(5) Section 301.552--Monitoring of License Holder;

(6) Section 301.452--Grounds for Disciplinary Action;

(7) Section 301.453--Disciplinary Authority of Board; Methods of Discipline;

(8) Section 301.457--Complaint and Investigation;

(9) Section 301.159--Board Duties Regarding Complaints;

(10) Section 301.463--Agreed Disposition;

(11) Section 301.462--Voluntary Surrender of License;

(12) Section 301.454--Notice and Hearing;

(13) Section 301.458--Initiation of Formal Charges; Discovery;

(14) Section 301.459--Formal Hearing;

(15) Section 301.460--Access to Information;

(16) Section 301.352--Protection for Refusal to Engage in Certain Conduct;

(17) Section 301.455--Temporary License Suspension;

(18) Section 217.11--Standards of Professional Nursing Practice;

(19) Section 217.12--Unprofessional Conduct; and

(20) Sections 213.1 - 213.33--Practice and Procedure.

§213.32. Schedule of Administrative Fine(s).

In disciplinary matters, the Board may assess a monetary penalty or fine in the circumstances and amounts as described.

(1) The following violations may be appropriate for disposition by fine with or without educational stipulations:

(A) practice on a delinquent license for more than six months but less than two years:

(i) first occurrence: $250;

(ii) subsequent occurrence: $500;

(B) practice on a delinquent license for two to four years:

(i) first occurrence: $500;

(ii) subsequent occurrence: $1,000;

(C) practice on a delinquent license more than four years: $1,000 plus $250 for each year over four years;

(D) aiding, abetting or permitting a registered nurse to practice on a delinquent license:

(i) first occurrence: $100 - $500;

(ii) subsequent occurrence: $200 - $1,000;

(E) failure to comply with CE requirements:

(i) first occurrence: $100;

(ii) subsequent occurrence: $250;

(F) failure to comply with mandatory reporting requirements:

(i) first occurrence: $100 - $500;

(ii) subsequent occurrence: $200 - $1,000;

(G) failure to assure licensure/credentials of personnel for whom the nurse is administratively responsible:

(i) first occurrence: $100 - $500;

(ii) subsequent occurrence: $200 - $1,000;

(H) failure to provide employers, potential employers, or the Board with complete and accurate answers to either oral or written questions on subject matters including but not limited to: employment history, licensure history, criminal history:

(i) first occurrence: $200 - $800;

(ii) second occurrence: $500 - $1000;

(I) failure to report unauthorized practice:

(i) first occurrence: $100 - $500;

(ii) subsequent occurrence: $200 - $1,000;

(J) failure to comply with Board requirements for change of name/address:

(i) first occurrence: $100;

(ii) subsequent occurrence: $150;

(K) failure to develop, maintain and implement a peer review plan according to statutory peer review requirements:

(i) first occurrence: $100 - $1,000;

(ii) subsequent occurrence: $500 - $1,000;

(L) failure to file, or cause to be filed, complete, accurate and timely reports required by Board order:

(i) first occurrence: $100;

(ii) subsequent occurrence: $250;

(M) failure to make complete and timely compliance with the terms of any stipulation contained in a Board order:

(i) first occurrence: $100;

(ii) subsequent occurrence: $250;

(N) failure to report patient abuse to the appropriate authority of the State of Texas, including but not limited to, providing inaccurate or incomplete information when requested from said authorities:

(i) first occurrence: $500;

(ii) second occurrence: $1000 - $5000; and

(O) other non-compliance with the NPA, Board rules or orders which does not involve fraud, deceit, dishonesty, intentional disregard of the NPA, Board rules, Board orders, harm or substantial risk of harm to patients, clients or the public:

(i) first occurrence: $100 - $500;

(ii) subsequent occurrence: $200 - $1,000.

(2) The following violations may be appropriate for disposition by fine in conjunction with one or more of the penalties/sanctions listed in these rules:

(A) violations other than those listed in paragraph (1)(A) - (N) of this section:

(i) first occurrence: $100 - $1,000;

(ii) subsequent occurrence: $200 - $1,000; and

(B) a cluster of violations listed in paragraph (1)(A) - (O) of this section: $100 - $5,000.

(3) Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty or fine.

(4) The executive director is authorized to dispose of violations listed in paragraph (1)(A) - (O) of this section, by fine, or by a combination of fine and stipulations for education, which shall be effective without ratification by the Board. The executive director shall report such cases to the Board at its regular meetings.

§213.33. Factors Considered for Imposition of Penalties/Sanctions and/or Fines.

(a) The following factors shall be considered by the executive director when determining whether to dispose of a disciplinary case by fine or by fine and stipulation and the amount of such fine. These factors shall be used by SOAH and the Board in determining the appropriate penalty/sanction in disciplinary cases:

(1) evidence of actual or potential harm to patients, clients, or the public;

(2) evidence of a lack of truthfulness or trustworthiness;

(3) evidence of misrepresentation(s) of knowledge, education, experience, credentials, or skills which would lead a member of the public, an employer, a member of the health-care team, or a patient to rely on the fact(s) misrepresented where such reliance could be unsafe;

(4) evidence of practice history;

(5) evidence of present fitness to practice;

(6) evidence of previous violations or prior disciplinary history by the Board or any other health care licensing agency in Texas or another jurisdiction;

(7) the length of time the licensee has practiced;

(8) the actual damages, physical, economic, or otherwise, resulting from the violation;

(9) the deterrent effect of the penalty imposed;

(10) attempts by the licensee to correct or stop the violation;

(11) any mitigating or aggravating circumstances;

(12) the extent to which system dynamics in the practice setting contributed to the problem; and

(13) any other matter that justice may require.

(b) Each specific act or instance of conduct may be treated as a separate violation.

(c) Unless otherwise specified, fines shall be payable in full by cashier's check or money order not later than the 45th day following the entry of an Order.

(d) The payment of a fine shall be in addition to the full payment of all applicable fees and satisfaction of all other applicable requirements of the NPA and the Board's rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 26, 2002.

TRD-200204672

Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective date: August 15, 2002
Proposal publication date: May 3, 2002
For further information, please call: (512) 305-6823

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §501.77

The Texas State Board of Public Accountancy ("the Board") adopts an amendment to Section 501.77 concerning Acting Through Others without changes to the proposed text as published in the May 31, 2002 issue of the *Texas Register* (27 TexReg 4669).

The amendment allows the Board to attach liability for a CPA firm's non-CPA owners' conduct to the CPA firm.

The amendment will function by providing continued accountability of CPA firms even when inappropriate conduct is committed by non-CPA owners of CPA firms.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.354 which authorizes non-CPA ownership of CPA firms.

This agency 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 July 26, 2002.

TRD-200204634
Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Effective date: August 15, 2002
Proposal publication date: May 31, 2002
For further information, please call: (512) 305-7848

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CHAPTER 505. THE BOARD

22 TAC §505.10

The Texas State Board of Public Accountancy ("the Board") adopts an amendment to Section 505.10 concerning Board Committees with changes to the proposed text as published in the May 31, 2002 issue of the *Texas Register* (27 TexReg 4670). The changes are in paragraph (12) in which the words "at least" was added to the first sentence and the sentence "At least one Committee member shall be a public member of the board" has been added to the second sentence. This is not a substantive change to the proposed amendment because §901.153 of the Act requires at least one public member of the board be a member of an enforcement committee.

The amendment allows the Board to increase the efficiency and effectiveness of its investigatory capabilities by utilizing volunteer CPA investigators.

The amendment will function by allowing the Board to utilize volunteer CPA investigators.

No comments were received regarding adoption of the rule.

The amendment is adopted under the Public Accountancy Act, Tex. Occupations Code, §901.151 (Vernon 2001) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act and §901.162 which authorizes the Board to use constructive enforcement volunteers.

§505.10. Board Committees.

(a) Committee appointments. Appointments to standing committees and ad hoc committees shall be considered annually by the board's presiding officer to assist in carrying out the functions of the board under the provisions of the Public Accountancy Act. Committee appointments shall be made by the presiding officer for a term of two years but may be terminated at any point by the presiding officer. Committee members may be re-appointed at the discretion of the presiding officer. The board's presiding officer shall be an ex officio member of each standing committee and ad hoc committee and chairman of the executive committee.

(b) Committee actions. The actions of the committees are recommendations only and are not binding until ratification by the board at a regularly scheduled meeting.

(c) Committee meetings. Committee meetings shall be held at the call of the committee chairman, and a report to the board at its next regularly scheduled meeting shall be made by such chairman or, in the absence of the chairman, by another board member serving on the committee.

(d) Vacancies. If for any reason a vacancy occurs on a committee, the board's presiding officer may appoint a replacement in accordance with subsection (a) of this section.

(e) Standing committee structure and charge to committees. The standing committees shall consist of the following individuals and shall be charged with the following responsibilities.

(1) The executive committee shall be comprised of the board's presiding officer, assistant presiding officer, secretary, treasurer, immediate past presiding officer of the board if still serving on the board, and at least one other officer elected by the board. The executive committee may act on behalf of the full board in matters of urgency, or when a meeting of the full board is not feasible; the executive committee's actions are subject to full board ratification at its next regularly scheduled meeting. The functions of the executive committee shall be to advise, consult with, and make recommendations to the board concerning matters requested by the board's presiding officer, including:

(A) litigation;

(B) proposed changes in the board rules of professional conduct (the rules);

(C) amendments to the Act;

(D) responses/positions relating to papers, reports, and other submissions from national associations or boards; and

(E) special issues.

(2) The continuing professional education committee shall be comprised of at least two board members, one of whom shall serve as chairman, assisted by at least two non-board members who shall serve in an advisory capacity. The committee shall make recommendations to the board regarding:

(A) the mandatory continuing professional education program as it relates to reporting and attendance requirements, registration and monitoring of continuing professional education sponsors, disciplinary actions, reporting forms, and office procedures;

(B) proposed changes in board rules, opinions, and policies related to the mandatory continuing professional education program as it relates to licensees and to relations with sponsors of continuing professional education;

(C) investigations of sponsor compliance with the terms of the sponsor agreements, including the related recordkeeping requirements;

(D) the results of monitoring continuing professional education courses for the purpose of evaluating the facilities, course content as presented, and the adequacy of the course presenter(s); and

(E) any significant deficiencies observed in carrying out subparagraphs (C) and (D) of this paragraph.

(3) The qualifications committee shall be comprised of at least two board members, one of whom shall serve as chairman. The committee shall make recommendations to the board regarding:

(A) the educational qualifications of an applicant for the Uniform Certified Public Accountant Examination in accordance with §§511.51 through 511.59 of this title (relating to Educational Requirements);

(B) the administration, security, discipline, and other aspects of the conduct of the Uniform Certified Public Accountant Examination in Texas;

(C) the work experience qualifications of an applicant for the certified public accountant certificate in accordance with §§511.121 through 511.124 of this title (relating to Experience Requirements); and/or

(D) where applicable, the equivalency examination measuring the professional competency of an applicant for a CPA certificate by reciprocity; and

(E) proposed changes in board rules, opinions, and policies relating to the qualifications process.

(4) The licensing committee shall be comprised of at least two board members, one of whom shall serve as chairman. The committee shall make recommendations to the board regarding:

(A) applications for certification, registration, and licensure;

(B) requests or applications for reinstatement of any certificate, registration, or license which the board previously has revoked, suspended, or refused to renew; and

(C) proposed changes in board rules, opinions, and policies as they relate to the licensing process.

(5) The behavioral enforcement committee shall be comprised of at least two board members, one of whom shall serve as chairman, assisted by at least two non-board members who shall serve in an advisory capacity. The committee shall:

(A) study complaints from any source involving possible violations of the Act by certificate or registration holders and others;

(B) study possible violations by certificate or registration holders of the behavioral standards within the rules;

(C) make recommendations to the board concerning the disposition of such possible violations;

(D) follow up on board orders to insure that certificate or registration holders and others adhere to sanctions prescribed by or agreements with the board; and

(E) make recommendations to the board concerning proposed changes in board rules, opinions, and policies related to the behavioral restraints of the rules and the Act.

(6) The technical standards review committee shall be comprised of at least two board members, one of whom shall serve as chairman, and at least three non-board members with recognized experience in industry, government, and education. The committee shall:

(A) study complaints from any source involving suspected violations of the technical standards included in the rules and shall make recommendations to the board as appropriate; and

(B) follow up on board orders to insure that certificate or registration holders and others adhere to sanctions prescribed by or agreements with the board.

(7) The peer review committee shall be comprised of at least two board members, one of whom shall serve as chairman, assisted by any number of non-board members who shall serve in an advisory capacity. The committee shall:

(A) conduct a periodic review and evaluation of reports publicly filed with the State of Texas (or any board, commission, or agency thereof) and of each of the various types of reports, as defined by board rule, of each practice unit, as defined by board rule, which is engaged in the practice of public accountancy in the State of Texas;

(B) refer to the technical standards review committee egregious substandard reports issued by practice units for which educational rehabilitation has not been effective; and

(C) make recommendations to the board with regard to proposed changes in board rules, opinions, and policies relating to the quality review program.

(8) The board rules committee shall be comprised of at least two board members, one of whom shall serve as chairman, assisted by any number of non-board members who shall serve in an advisory capacity. The committee shall make recommendations to the board and propose changes regarding board rules. All committees shall endeavor to consult with the board rules committee concerning proposed rules.

(9) The regulatory compliance committee shall be comprised of at least two board members, one of whom shall serve as chairman, assisted by any number of non-board members who shall serve in an advisory capacity. The committee shall make recommendations to the board regarding legislative oversight, including, but not limited to, budget, performance measures, proposed changes in legislation affecting the board, and computer utilization.

(10) The major case enforcement committee shall be comprised of at least two board members, one of whom shall serve as chairman. At least one committee member shall be a public member of the board. The committee shall make recommendations to the board regarding legal matters on litigation or potential litigation, and other major cases to which the board is a party. The committee shall have the authority to act on behalf of the board in instances where disclosure of facts to the full board could cause the board's objectivity to be jeopardized, subject to final approval by the board. The board shall have sole authority to determine whether cases shall be heard by the major case enforcement committee or other enforcement committee.

(11) The peer assistance oversight committee shall be comprised of at least two board members, one of whom shall serve as chairman. The committee shall oversee the peer assistance program administered by the Texas Society of Certified Public Accountants as required under the Texas Health and Safety Code, Chapter 467.001(B), and insure that the minimum criteria as set out by the Texas Commission on Alcohol and Drug Abuse are met. It shall make recommendations to the board and the TSCPA regarding modifications to the program and, if warranted, refer cases to other board committees for consideration of disciplinary or remedial action by the board. The committee shall report to the board on a quarterly basis, by case number, on the status of the program.

(12) The constructive enforcement committee shall be comprised of at least two board members, one of whom shall serve as chairman, assisted by non-board CPA members who shall also serve as investigators. At least one Committee member shall be a public member of the board. The committee shall approve the constructive enforcement program, coordinate its activities with board committees and staff, and supervise the training of committee members. A staff attorney of the board shall supervise the day to day administration of the constructive enforcement program and activities of the committee's non-board members on behalf of the committee chairman. The committee shall:

(A) investigate matters forwarded to the committee from any other board committee or board staff in accordance with board instruction and policy;

(B) prepare, as appropriate, investigative reports regarding each referred matter;

(C) inform referring board committees or board staff of the results of its investigations;

(D) inform the appropriate committee when possible violations of board rules and the Public Accountancy Act are observed; and

(E) make recommendations to the board concerning proposed changes in board rules, opinions, and policies relating to the constructive enforcement program.

(f) Ad hoc advisory committees. Ad hoc advisory committees may be established by the board's presiding officer and members and advisory members appointed as appropriate.

(g) Definition of terms. As used in this section, the terms "chairman" and "chairmen" are used for convenience and are intended to include persons of either sex.

(h) Policy guidelines. All advisory committee members performing any duties utilizing board facilities and/or who have access to board records, shall conform and adhere to the standards, board rules, and personnel policies of the board as described in its personnel manual and to the laws of the State of Texas governing state employees.

This agency 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 July 26, 2002.

TRD-200204637
Amanda G. Birrell
General Counsel
Texas State Board of Public Accountancy
Effective date: August 15, 2002
Proposal publication date: May 31, 2002
For further information, please call: (512) 305-7848

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. PROVISIONS OF THE REAL ESTATE LICENSE ACT

SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §535.71, §535.72

The Texas Real Estate Commission (TREC) adopts an amendment to §535.71 concerning approval of mandatory continuing education (MCE) providers, courses and instructors without changes to the proposed text as published in the June 21, 2002, issue of the *Texas Register* (27 TexReg 5368). The amendment to §535.71 adopts by reference a revised form, MCE 9-5, Alternative Instructional Methods Reporting Form, which is used by the provider and the student to report the student's passing of the examination and successful completion of the course. Additional language is added to the student's representation to indicated that the student worked independently in completing an examination associated with a course offered by correspondence or alternative delivery method. The amendment to §535.72 updates a reference to the revised reporting form.

Adoption of the amendments to §535.71 and to §535.72 is necessary to avoid confusion in the reporting of completion of courses offered by correspondence or alternative delivery method and to clarify a student's obligation to work independently on a course examination. The public benefit anticipated as a result of enforcing the sections will be an enhancement of the educational process for schools and instructors.

No comments were received regarding the proposal.

The amendment is adopted under Texas Civil Statutes, Article 6573a, §5(h), which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204564

Loretta DeHay
General Counsel
Texas Real Estate Commission
Effective date: August 13, 2002
Proposal publication date: June 21, 2002
For further information, please call: (512) 465-3900

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SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.214

The Texas Real Estate Commission (TREC) adopts an amendment to §535.214, concerning inspector examinations without changes to the proposed text as published in the June 21, 2002, issue of the *Texas Register* (27 TexReg 5368).

The amendment to section 535.214(a) sets the minimum passing score for real state inspector examinations to 70%. Because professional inspectors are required to have a higher level of competency than real estate inspectors, the amendment sets the minimum passing score for professional inspector examinations to 80%. The public benefit anticipated as a result of enforcing the section will be clarification of the examination standards for inspector license applicants.

No comments were received regarding the proposal.

The amendment is adopted under Texas Civil Statutes, Article 6573a, §5(h), which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on July 24, 2002.

TRD-200204563
Loretta DeHay
General Counsel
Texas Real Estate Commission
Effective date: September 1, 2002
Proposal publication date: June 21, 2002
For further information, please call: (512) 465-3900

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 22. PRIVACY

SUBCHAPTER B. INSURANCE CONSUMER HEALTH INFORMATION PRIVACY

28 TAC §22.56

(Editor's Note: Due to errors by the Texas Department of Insurance, the adopted §22.56 is being republished.)

The Texas Department of Insurance filed the adoption of 28 TAC §§22.51 - 22.57 and §§22.60 - 22.67 for publication in the July 19, 2002, issue of the *Texas Register* (27 TexReg 6505).

Due to an error by the Texas Department of Insurance the adopted preamble for §22.56 stated the section was adopted without changes instead of with changes.

Section 22.56(e) also contained an error. The date shown in subsection (e) should be 15 days and not "the fifth day."

§22.56. Revocation of Authorizations.

(a) A consumer or person who has signed an authorization described in this subchapter may at any time revoke that authorization.

(b) Revocation of any authorization made pursuant to this subchapter is subject to the rights of a person who acted in reasonable reliance on the authorization before receiving notice of the revocation.

(c) A revocation must be in writing and signed by the consumer about whom the authorization was made or by a person legally empowered to authorize disclosure on behalf of the consumer.

(d) A covered entity:

(1) may not require a revocation to be on a particular form; and

(2) must honor a revocation that reasonably identifies the authorization that it is intended to revoke.

(e) A covered entity shall effect a revocation as soon as possible after receipt but not later than 15 days after the date of receipt.

This agency 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 July 30, 2002.

TRD-200204847
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: September 1, 2002
Proposal publication date: January 4, 2002
For further information, please call: (512) 463-6327

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PART 2. TEXAS WORKERS' COMPENSATION COMMISSION

CHAPTER 116. GENERAL PROVISIONS-SUBSEQUENT INJURY FUND

28 TAC §116.11, §116.12

The Texas Workers' Compensation Commission (the commission) adopts amendments to §§116.11 and 116.12 with changes to the proposed text published in the March 8, 2002 issue of the *Texas Register* (27 TexReg 1657).

As required by the Government Code §2001.033(1), the commission's reasoned justification for this rule is set out in this order, which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the

reasons why the commission disagrees with some of the comments and proposals.

Changes made to the proposed rule are in response to public comment received in writing and at a public hearing held on March 21, 2002, and are described in the summary of comments and responses section of this preamble. Other changes were made based on further review by staff to clarify the rule, ensure consistency, or to correct typographical or grammatical errors.

House Bill 2600 (HB-2600) passed by the 77th Texas Legislature amended Texas Labor Code §403.006 to include new liabilities for the subsequent injury fund (SIF) for certain claims based on compensable injuries that occur on or after July 1, 2002. The statutory amendments provided for reimbursement from the SIF for the portion of income benefits that are attributable to multiple employment and are paid pursuant to Texas Labor Code §408.042. Reimbursement was also provided for medical benefits for initial pharmaceutical services that are paid pursuant to Texas Labor Code §413.0141 for claims later determined to be non-compensable. Amendments to §116.11 and §116.12 are adopted to add these new eligible types of carrier requests for SIF reimbursement to the rules and to govern the documentation, application process, and other administrative requirements to implement the statutory provisions. The amended rules address carrier requests for reimbursement, and establish the criteria for making these requests. Other commission rules address, or will address, HB-2600 changes related to the entitlement to income or medical benefits.

An additional liability added to the SIF through this legislation is the payment of an assessment of feasibility and the development of regional networks established under §408.0221 of the Texas Labor Code. The cost for this liability is a one-time expense and is limited to an amount not to exceed $1.5 million. Any ongoing regional network administration and management services shall be included in the fees for health care services paid by insurance carriers participating in the regional networks.

Changes in the text as proposed are found in §116.11(a), (c), (d), and (e). Changes from the proposed text were made to §116.12 as a result of comments and following review by staff. The changes and additions to current §116.11 and §116.12 are in response to new legislation enacted by the 77th Texas Legislature. Other changes from the current rule were made to simplify rule construction. The structure is more prescriptive and clear. The rule explicitly describes expectations so all system participants will understand the requirements that the Act and rules place on them.

AMENDMENTS TO §116.11 - REQUEST FOR REIMBURSEMENT OR REFUND FROM THE SUBSEQUENT INJURY FUND

Section 116.11 was redesigned to specify the required documentation for each type of request for reimbursement. Although some of the requirements may be identical for all types of requests, each list includes all the requirements for that particular type of request. Requirements are similar to the proposed version, but have been clarified to identify documentation for the Subsequent Injury Fund (SIF) to determine reimbursement amounts.

Amendments to §116.11(a) add multiple employment and initial pharmaceutical coverage to the list of eligible payments for which carriers may request reimbursement from the SIF. Based on public comment, §116.11(a) was amended from its proposed version to cite the appropriate portion of the Act applicable to each type of reimbursement to which a carrier may be eligible. This information will provide ease of reference, clarity, and consistency to the rule.

For purposes of reimbursements for initial pharmaceutical coverage, §116.11(a)(4)(A) and (B) were added to address how a claim can be determined not to be compensable. Public comment expressed concern regarding the inability of a carrier to seek reimbursement from the SIF for initial pharmaceutical payment in instances where a carrier timely disputes compensability, but the injured employee fails to pursue their claim . As a result of this concern, for purposes of initial pharmaceutical SIF reimbursements to carriers only, a claim will be determined not compensable if an injured employee fails to pursue their claim within one year from the date the commission receives a timely dispute of compensability from a carrier. A determination under subsection (a)(4)(B), however, does not constitute a final determination and will not preclude a party from pursuing their claim through the commission's dispute resolution process. A carrier will be required to reimburse the SIF for any initial pharmaceutical reimbursement received if the claim is later determined to be compensable.

Subsection (b) distinguishes recoupable and unrecoupable overpayments. No amendment to (b) was proposed and none was necessary in response to public comment or following further review by staff.

Section 116.11(c) describes the requirements specific to requests for reimbursement of unrecoupable benefit overpayments made by an insurance carrier under an interlocutory order or decision of the commission that is later reversed or modified by final arbitration, order, or decision of the commission, the State Office of Administrative Hearings, or court of last resort. Subsection (c) was changed from the proposed version to clarify the request for all intermediate decisions and orders that may affect the amount of benefits the insurance carrier paid.

Section 116.11(d) addresses the requirements for submitting a request for a refund of death benefits to the SIF pursuant to §403.007(d) of the Act before a beneficiary is found eligible to receive death benefits.

Section 116.11(e) describes requirements specific to requests for reimbursement from the SIF of the portion of income benefits paid to an injured employee that is attributable to multiple employment. Subsection (e) was changed from the proposed version to clarify the necessary wage related documentation to assist the SIF in determining the appropriate reimbursement amount.

Section 116.11(f) describes the necessary documentation for an insurance carrier seeking reimbursement from the SIF for initial pharmaceutical coverage. In accordance with Texas Labor Code §413.0141, the commission may adopt rules regarding initial pharmaceutical coverage on or after September 1, 2002. As a result, the provisions of new §116.11(f) are not applicable unless and until such a rule is adopted. Subsection (f) was changed from the proposed version to clarify the necessary prescription documentation to enable the SIF to make the final determination of the reimbursement amount.

As noted previously, each list in subsection (c) through (f) includes all the requirements for that particular type of request. Subsections (e) and (f) also include provisions regarding the timeframes in which requests must be submitted. Per §403.006(d), the commission may make partial payment of insurance carrier requests related to multiple employment and

initial pharmaceutical reimbursements. Timeframes are applied in this situation to administratively implement and manage the limited specific statutory requirement. Timeframes are not necessary in other instances of reimbursement because partial payments are not applicable. Full reimbursements are required regardless of when the request is submitted for death benefit refunds and SIF reimbursements for unrecoupable overpayments pursuant to an overturned decision of a hearing officer or the appeals panel or an interlocutory order. Placing a limit on the timeframe to file for reimbursement will also allow insurance carriers earlier and more frequent access to recovery from the SIF since, in certain instances (such as multiple employment), carrier payments to an injured employee do not necessarily have to be exhausted before a request is submitted. Furthermore, the commission will be able to project a more accurate trending analysis. This, in turn, will assist the commission in determining whether SIF funding is adequate and whether an appropriate adjustment to the maintenance tax rate to insurance carriers will be necessary to meet legislative SIF requirements.

AMENDMENTS TO §116.12 - SUBSEQUENT INJURY FUND PAYMENT/REIMBURSEMENT SCHEDULE

Amendments to §116.12(a) add and prioritize the reimbursement of requests by carriers made pursuant to §408.042(g) of the Act relating to multiple employment and §413.0141 of the Act relating to initial pharmaceutical coverage. These two additional types of requests for reimbursement have been assigned a lesser priority as a result of the authority provided by Texas Labor Code §403.006(d) which allows the commission to make partial payment of these requests based on actuarial assessment of available funding.

Subsection (e) describes the process the commission will use to calculate partial payment of requests for reimbursement for multiple employment and/or initial pharmaceutical coverage, if partial payments are necessary. If requests for reimbursements under this subsection are reimbursed with partial payment, no further future recovery will be available from the SIF for any non-reimbursed portion for the reasons discussed later.

Amendments to §116.12 were necessary in response to public comment and following further review by staff. Section 116.12(h) was amended to add exceptions consistent with the language at §116.11(a)(3) and (4).

GENERAL 116 COMMENTS

Comments regarding the rules as proposed were received from the following groups; Lockheed Martin Aeronautics Co.; Injured Workers Assistance Center; American Insurance Association; Insurance Council of Texas; Flagive, Ogden & Latson; and Texas Mutual Insurance. Comments were also received from an individual.

Comments generally supporting the proposed amendments were received from the Injured Workers Assistance Center. Comments generally opposing the proposed amendments where received from The Insurance Council of Texas. Many other comments neither generally supporting nor opposing the proposed amendments but suggesting changes were received from the following groups: Lockheed Martin Aeronautics Co; American Insurance Association; Flagive, Ogden & Latson; and Texas Mutual Insurance.

Summaries of the comments and commission responses are as follows:

Comment: Commenter recommended citing the appropriate portion of the Act applicable to each type of reimbursements a carrier may request to make the entire rule consistent with the proposed text.

Response: The commission agrees. Citations have been added when appropriate.

Comment: Since §116.11(b) only addresses one of the three possible situations for the amount of reimbursement a carrier may be entitled or eligible to receive from the SIF and does not address the refund situation described in (a)(2), Commenter recommends changing §116.11(b) to include Texas Labor Code §408.042 for income benefits attributable to multiple employment and §413.0141 for initial pharmacy coverage.

Response: Commission disagrees. Multiple Employment and Initial Pharmaceutical Coverage reimbursements are not referred to as overpayments. §116.11(b) only references overpayments which are addressed in (a)(1), and does not apply to reimbursements under (a)(3) or (a)(4) or to a refund under (a)(2).

Comment: Commenter expressed concern that §116.11(b) provides no limitation on the nature of these income benefits, besides the word "other." Commenter questioned whether this provision intended to overrule Appeals Panel decisions that do not allow a carrier to recover benefits paid pursuant to a subsequently overturned order against future wage replacement benefits, such as SIBS (961039) and TIBs (961043) whose decisions held that reimbursement from the SIF was the carrier's exclusive remedy. Commenter felt the language of this subsection seems to mandate reduction of SIBs and TIBs to recover any overpayment, prior to requesting reimbursement from the SIF.

Response: The Appeal Panel decisions cited in the comment were filed prior to the rule change adopted on March 13, 2000. No changes to this subsection were proposed or adopted. The language used in this subsection provides a definition of the reimbursement to which a carrier may be entitled. The reimbursement will not cover overpayments caused by carrier error or paid voluntarily. A carrier is also required to take credit against other income benefits in the case of an overpayment to an injured employee prior to being entitled to reimbursement. This includes all amounts that were recoverable or convertible from other income benefits. For example, if a carrier overpaid temporary income benefits by $500 pursuant to an interlocutory order and the employee was entitled to an additional $300 in the form of impairment income benefits, the unrecoupable overpayment for which the carrier could be reimbursed would be $200 because the carrier owed $300, whether as TIBs or IIBs.

Comment: Section 116.11(e)(4) - Commenter expressed a need for consistency between the documentation requirements for requesting reimbursement from the SIF per this subsection and the average weekly wage rules adopted in April.

Response: Commission agrees. Staff responsible for addressing legislative changes to both AWW and SIF reimbursements resulting from HB-2600 has worked closely throughout the development of these new rules. The AWW rules were adopted in April of 2002 and were used as reference material for the SIF rule development to ensure consistency.

Comment: Commenter requested clarification in the rules or Preamble regarding the difference in documentation requirements between §§116.11(e)(2) and 116.11(e)(7)(A).

Response: Commission agrees. Section 116.11 has been restructured so that required documentation is listed separately for each type of request, even though some of the requirements are the same for all types of requests. This clarifies the issue raised in this comment.

Comment: Commenter recommended deleting §116.11(e)(6)(A) and (B) and combining the information into §116.11(e)(6).

Response: Commission disagrees. In order to evaluate the eligible reimbursable amount from the SIF due to multiple employment, the commission needs wage information pertinent to the non-claim employment in addition to that earned from the claim employer.

Comment: - Commenter agreed with the one-year limit in §116.11(c) because SIF cannot withstand retroactive claims.

Response: Commission agrees. Placing a limit on the timeframe to file for reimbursement will also allow insurance carriers earlier and more frequent access to recovery from the SIF since, in certain instances (such as multiple employment), carrier payments to an injured employee do not necessarily have to be exhausted before a request is submitted. Furthermore, the commission will be able to project a more accurate trending analysis. This, in turn, will assist the commission in determining whether the funding is adequate and whether an appropriate adjustment to the maintenance tax rate to insurance carriers will be necessary to meet legislative SIF requirements.

Comment: Commenter raised concern over language indicating requests for reimbursement will not be considered if it is not submitted within a timeframe set out in the statute. Commenter feared this would generate another situation similar to what resulted in the Fulton decision on the 90-day rule.

Response: Commission disagrees. Section 408.042 provides for the commission to adopt rules that govern the documentation, application process, and other administrative requirements necessary to implement reimbursement from the SIF. Per §403.006(d), the commission may make partial payment of insurance carrier requests related to multiple employment and initial pharmaceutical reimbursements. Timeframes are applied in this situation to administratively implement and manage the limited specific statutory requirement. Timeframes are not necessary in other instances of reimbursement because partial payments are not applicable. Full reimbursements are required regardless of when the request is submitted for death benefit refunds and SIF reimbursements for unrecoupable overpayments pursuant to an overturned decision of a hearing officer or the appeals panel or an interlocutory order.

Comment: Commenter expressed concern that there is no statutory authority to limit the reimbursement to partial payments if there is a shortfall in the fund. Commenter contends that the statute gave the commission the duty to prioritize the claims, but does not give the commission the right to ultimately limit them. Commenter suggested that per §403.007(e), the commission is required to ensure that there is sufficient funding of the SIF. The language of this section specifically indicates that the funds for the underfunded liabilities be available "for the next biennium."

Response: The commission disagrees. Section 403.006(d) of the statute explicitly allows for partial payment of reimbursement requests related to initial pharmaceutical and multiple employment if the actuarial assessment of the SIF reflects the need for such action. Since the SIF would already be at a questionable financial state at the point partial payments become necessary, it is highly unlikely that there would be more than minimal assets available to pay previously unpaid reimbursements. In addition, the statutory language does not support the argument that the Legislature intended to require periodic payments until the total request was reimbursed. If the actuarial assessment determines that the funding available is not adequate to meet the expected obligations of the SIF, then, per §403.006(d), the commission may make partial payment of insurance carrier requests related to multiple employment and initial pharmaceutical reimbursements. A maintenance tax will be assessed at a rate adequate to provide 120 percent of the projected unfunded liabilities of the fund for the next biennium. The funds that must be available are those projected to be unfunded in the next biennium.

Comment: Commenter understands that time limits may be necessary for appropriate management of the SIF and proposed that §116.11(c) and (d) be changed to either: (1) remove time frames from the proposed rules consistent with the statute; (2) add time frames for all requests for reimbursement or refund from the SIF for consistency; or (3) change proposed subsections (c) and (d) to reduce confusion, if one of the prior two recommendations are not appropriate.

Response: Commission disagrees. Per §403.006(d), the commission may make partial payment of insurance carrier requests related to multiple employment and initial pharmaceutical reimbursements. Timeframes are applied in this situation to administratively implement and manage the limited specific statutory requirement. Timeframes are not necessary in other instances of reimbursement because partial payments are not applicable. Full reimbursements are required regardless of when the request is submitted for death benefit refunds and SIF reimbursements for unrecoupable overpayments pursuant to an overturned decision of a hearing officer or the appeals panel or an interlocutory order.

Comment: Commenter recommended that the commission wait until the rules regarding initial pharmaceutical coverage are developed before adopting documentation requirements for requests for reimbursement from the SIF for initial pharmaceutical coverage or simultaneously propose the rules to ensure consistency.

Response: Commission disagrees that there is a need to simultaneously propose the two sets of rules. Coordination is essential to the development of documentation requirements to ensure consistency and commission staff responsible for addressing the issues of initial pharmaceutical coverage and SIF reimbursement have been working in conjunction throughout the development of these rules.

Comment: Commenter stated that proposed amended §§116.11 and 116.12 allow a carrier to request reimbursement for Initial Pharmaceutical Coverage "after final decision of the commission or the court of last resort determines the injury is not compensable." The proposed rules do not allow a carrier to request reimbursement from the SIF in a situation in which an injured employee does not request dispute resolution of the carrier's determination and denial of compensability. New Texas Labor Code §413.0141 does not require a final decision of the commission or court of last resort but the proposed rules add this requirement. Commenter suggested addressing this situation without requiring the carrier and commission to incur the additional costs of obtaining a commission decision when an injured employee

does not wish to pursue resolution of the carrier's determination of non-compensability. A carrier determination of non-compensability appears sufficient to satisfy the requirement in new §413.0141.

Response: Commission agrees in part. §413.0141 allows for reimbursement in the event an injury is determined not to be compensable. The commission disagrees that a carrier determination of non-compensability is sufficient to satisfy the requirement in new §413.0141. A party needs to be provided an opportunity to pursue compensability; however, the commission also understands the limit this scenario places on a carrier's opportunity for reimbursement of initial pharmaceutical coverage from the SIF. To address this concern, the commission added §116.11(a)(4)(A) and (B) that clarify "determination" of non-compensability and provide an opportunity for carriers to request reimbursement of initial pharmaceutical coverage if a claimant fails to respond within one year of a timely dispute of compensability filed with the commission by a carrier. A determination under this subsection is applicable only for purposes of SIF reimbursement and does not preclude a party from pursuing their claim through the commission's dispute resolution process. Carriers will be required to reimburse the SIF for any initial pharmaceutical reimbursement received if the claim is later determined to be compensable.

Comment: Commenter requested clarification in §116.11(e)(7) or the Preamble regarding whether a carrier can seek reimbursement for and would be required to pay for pharmaceutical services sufficient for the first seven days following the date of injury when the carrier determines the prescription is not medically necessary to treat the injury or the medication is unrelated to the injury or when the physician prescribes a brand name when a generic equivalent is available and clinically appropriate. Commenter also requested clarification whether the carrier would be entitled to reimbursement when the carrier is required to pay pursuant to Texas Labor Code §413.0141 regarding Initial Pharmaceutical Coverage for a prescription medication when a claim is compensable but the prescription is not medically necessary to treat the compensable injury, is not related to the compensable injury or when a physician prescribes a brand name and a generic equivalent is available to treat the compensable injury.

Response: Commission disagrees that clarification is necessary. Section 413.0141 specifically states "The rules adopted by the commission shall provide that an insurance carrier is eligible for reimbursement for pharmaceutical services paid under this section from the subsequent injury fund in the event the injury is determined not to be compensable." Other than a commission determination of non-compensability, the Act does not provide for reimbursement from the SIF if the prescription is not medically necessary to treat the injury, is unrelated to the injury, or the physician prescribes a brand name when a generic equivalent is available and clinically appropriate.

Comment: Commenter requested clarification addressing the amount of reimbursement a carrier would be eligible to receive from the SIF and how a carrier would reimburse a pharmacy that dispensed 30 days of medication and the carrier would only be liable for the first seven days following the date of injury if the claim is later determined not to be compensable pursuant to Texas Labor Code §413.0141 regarding Initial Pharmaceutical Coverage.

Response: The commission disagrees that clarification in this rule is necessary. Section 413.0141 provides that insurance carriers are eligible for reimbursement for pharmaceutical services paid under this section, specified as pharmaceutical services sufficient for the first seven days following the date of injury, from the subsequent injury fund in the event the injury is determined not to be compensable. Only the cost of the portion of the prescription sufficient for the first 7 days following the injury is reimbursable. A worksheet will be designed to assist insurance carrier with the submission of requests for such reimbursement. Other proposed rules will provide further direction on how a carrier would reimburse a pharmacy and how to determine liability for the first seven days following the date of injury if the claim is later determined not to be compensable, or if the pharmaceutical services is not provided to the employee until the fourth day after the date of injury.

Comment: Commenter raised concern over the amount of documentary evidence required for recovery on pharmaceutical bills.

Response: Commission disagrees. The information required by the rule is necessary to determine whether the request is reimbursable from the SIF. To assist in diminishing the workload on carriers, a form will be developed by the commission outlining the necessary information for pharmaceutical reimbursement requests to be submitted to the SIF. The carriers will be required to certify the information is accurate. Commission staff will continue to verify requests for reimbursement from the SIF.

Comment: Commenter recommended changing §116.12(f) to direct the SIF administrator to enter appropriate orders for claims on a quarterly basis to allow a more expeditious manner for reimbursement requests.

Response: Commission agrees in part. Reimbursement requests based on reversed or modified commission decisions are currently reviewed and paid on a quarterly basis; however, reimbursements related to initial pharmaceutical requests and requests related to multiple employment may be partially paid based on available funding. Therefore, payments related to these reimbursement requests can only be determined on an annual basis after all other reimbursements have been made by the SIF.

Comment: Commenter recommended changing §116.12(e)(4) to read: "If reimbursement requests are paid with partial payments, further future recovery will be paid in subsequent fiscal years. If partial payment is required in subsequent fiscal years partial payments shall be calculated in accordance with §116.12(e)(1) through (e)(3). The requestor shall not be required to reapply for partial payments in subsequent fiscal years."

Response: Commission disagrees. The statute allows for partial payment of reimbursement requests related to initial pharmaceutical and multiple employment if the actuarial assessment of the SIF reflects the need for such action. Since the SIF would already be at a questionable financial state at the point partial payments become necessary, it is highly unlikely that there would be more than minimal assets available to pay previously unpaid reimbursements. In addition, the statutory language does not support the argument that the Legislature intended to require periodic payments until the total request was reimbursed.

Comment: Commenter advocated that reimbursement from the SIF not be allowed on any default judgment because carriers will have an incentive to dispute all claims to district court level. Claimants have difficulty finding legal representation for district court even with HB-2600 for payment to prevailing party.

Response: Commission agrees. Per §410.257(e) of the Texas Labor Code, a judgment based on a default or on an agreement of the parties does not constitute a modification or reversal of an appeals panel decision. As such, there can be no reimbursement from the SIF based on a default judgment.

Comment: Commenter was concerned that the language in §116.12(h) would prohibit a carrier from making an appropriate request for reimbursement in the situations described in §§116.11 and 116.12 if a dispute never existed and when a final decision of the commission, State Office of Administrative Hearings or court of last resort will never be received. The language in this rule needs to be changed to only require final resolution when it is applicable or when it is required by the statute.

Response: Commission agrees and the rule has been changed to address this. A detailed list of requirements for each type of reimbursement request was developed and is reflected in §116.11. Specifically, §116.11(c), (d), (e), and (f) indicate where a determination is necessary as a prerequisite to reimbursement requests. A final determination is necessary with all reimbursement requests other than requests related to multiple employment. An exception has been added for initial pharmaceutical request in §§116.11(a)(4) and 116.12(h).

Comment: Section 116.12(h) - Commenter felt the SIF administrator waiting until final resolution or decision of the commission, State Office of Administrative Hearings or the court of last resort before acting on a request for reimbursement from the SIF will allow carriers "indefinite perpetual time-tables for attempting ending paying claims merely for the purpose of collecting reimbursement from the SIF." Commenter questioned why the commission does not enforce proposed amendments to §§116.11 and 116.12 "requests for reimbursement for benefits paid by the carrier during fiscal year 9/1/02 through 8/31/03 must be submitted prior to 8/31/04. Commenter believed if the commission would strictly enforce the proposed amendments to §§116.11 and 116.12, there would be no need for additional SIF staff members.

Response: Commission agrees in part. An exception has been added for initial pharmaceutical requests in §§116.11(a)(4) and 116.12(h). Otherwise, without a final decision, the SIF Administrator could prematurely provide reimbursements on an ineligible claim. The proposed time limits are applicable only to reimbursement requests related to multiple employment and initial pharmaceutical claims. Additional SIF staff will be necessary to process the increased number of requests for reimbursement based on new statutory provisions and not as a result of the proposed rule amendments.

Comment: Commenter requested that the rule clarify that final judgment does include any judgments that are defaulted, particularly, in light of Article 8 being added to our statutes through HB-2600. Commenter contended that the final order under this rule should include any sort of default judgments which may occur in the future.

Response: Commission disagrees. Article 8 of HB2600 revises and adds statutory provisions regarding attorney's fees. However, per §410.257(e) of the Texas Labor Code, a judgment based on a default or on an agreement of the parties does not constitute a modification or reversal of an appeals panel decision. Compliance with section 408.221, which governs attorney's fees paid to claimant's counsel, requires the appearance of both parties for judicial review.

The amendments are adopted under the Texas Labor Code, §401.011, which contains definitions used in the Texas Workers' Compensation Act; the Texas Labor Code, §401.024, which provides the commission the authority to require use of facsimile or other electronic means to transmit information in the system; the Texas Labor Code §402.042, which authorizes the executive director to enter orders as authorized by the statute as well as to prescribe the form, manner and procedure for transmission of information to the commission; Texas Labor Code, §402.061, which authorizes the commission to adopt rules necessary to administer the Act, the Texas Labor Code §§403.002 - 403.007, which address maintenance tax and the subsequent injury fund; the Texas Labor Code §406.010, which authorizes the commission to adopt rules regarding claims service, the Texas Labor Code §408.042, which pertains to average weekly wage for part-time employees or employees with multiple employment and provides for reimbursement to insurance carriers for payments attributable to multiple employment; and the Texas Labor Code §413.0141, which provides initial pharmaceutical coverage and provides for reimbursement to insurance carriers of payments made for such coverage.

The amendments are adopted under the Texas Labor Code, §401.011, §401.024, §402.042, §402.061, §§403.002 - 403.007, §406.010, §408.042, §413.0141.

§116.11. Request for Reimbursement or Refund from the Subsequent Injury Fund.

(a) A carrier may request:

(1) reimbursement from the Subsequent Injury Fund ("SIF"), pursuant to §403.006(b)(2), for an overpayment of income, death, or medical benefits when the carrier has made an unrecoupable overpayment pursuant to decision of a hearing officer or the appeals panel or an interlocutory order, and that decision or order is reversed or modified by final arbitration, order, or decision of the commission, the State Office of Administrative Hearings, or a court of last resort; or

(2) a refund of death benefits pursuant to §403.007(d) for benefits paid to the SIF prior to a beneficiary being eligible to receive death benefits;

(3) for a compensable injury that occurs on or after July 1, 2002: a reimbursement from the SIF for the amount of income benefits paid to a worker that is attributable to multiple employment and is paid pursuant to §408.042 relating to Multiple Employment; or

(4) a reimbursement from the SIF made in accordance with rules adopted by the commission pursuant to §413.0141, Initial Pharmaceutical Coverage for injuries determined not to be compensable. For purposes of this subsection only, an injury is determined not to be compensable following:

(A) The final decision of the commission or the judgment of the court of last resort; or

(B) A claimant's failure to respond within one year of a timely dispute of compensability filed by an insurance carrier. In this instance only, the effective date of the determination of non compensability is one year from the date the dispute is filed with the commission by the carrier.

(i) A determination under this subsection does not constitute final adjudication. It does not preclude a party from pursuing their claim through the commission's dispute resolution process and it does not permit a health care provider to pursue a private claim against the claimant.

(ii) If the claim is later determined to be compensable, the carrier shall reimburse the subsequent injury fund for any initial pharmaceutical payment which the SIF refunded to the carrier. The carrier's reimbursement of the SIF shall be paid within the timeframe the carrier has to comply with the agreement, decision and order, or other judgment which found the claim to be compensable.

(b) The amount of reimbursement that the carrier may be entitled to is equal to the amount of unrecoupable overpayments paid and does not include any amounts the carrier overpaid voluntarily or as a result of its own errors. An unrecoupable overpayment of income benefits for the purpose of reimbursement from the SIF only includes those benefits that were overpaid by the carrier pursuant to an interlocutory order or decision which were finally determined to be not owed and which, in the case of an overpayment of income benefits to the employee, were not recoverable or convertible from other income benefits.

(c) Requests for reimbursement attributable to subsection (a)(1) of this section, insurance carrier claims of benefit overpayments made under an interlocutory order or decision of the commission that is later reversed or modified by final arbitration, order, or decision of the commission, the State Office of Administrative Hearings, or court of last resort shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the carrier is seeking reimbursement or refund;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, purpose of payments, total amount of payment requested, the payees, and the periods of benefits paid, as well as documentation that shows that the overpayment was unrecoupable as described in subsection (b), if applicable;

(3) the name, address, and federal employer identification number of the payee for any reimbursement or refund that may be due;

(4) copies of all relevant orders and decisions (Benefit Review Conferences, Interlocutory Orders, Contested Case Hearing Decision & Orders, Appeal Panel Decisions, and Court orders) that relate to the payment for which reimbursement is being requested along with an indication of which is the final decision on the matter;

(5) copies of all reports by the employer including, but not limited to, the Employer's First Report of Injury, the Wage Statement, and all Supplemental Reports of Injury for overpayments of income benefits; and

(6) if an overpayment of medical benefits, copies of all medical bills and preauthorization request forms associated with the overpayment for overpayments of medical benefits.

(d) Requests related to subsection (a)(2) of this section, related to a refund of death benefits paid to the SIF prior to a beneficiary being eligible to receive death benefits, shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the carrier is seeking reimbursement or refund;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, purpose of payments, total amount of payment requested, the payees, and the periods of benefits paid;

(3) the name, address, and federal employer identification number of the payee for any reimbursement or refund that may be due;

(4) the documentation the beneficiary provided with the claim for death benefits under §122.100 of this title (relating to Claim for Death Benefits); and

(5) the agreement, the final award of the commission, or the final judgment of a court of competent jurisdiction determining that the beneficiary is entitled to the death benefits, if entitlement to benefits had been disputed.

(e) Requests for reimbursement pursuant to subsection (a)(3) of this section shall be submitted on an annual basis for the payments made during the same or previous fiscal year. The fiscal year begins each September 1st and ends on August 31st of the next calendar year. For example, carrier payments made during the fiscal year from 9/1/02 through 8/31/03 must be submitted prior to 8/31/04. Any claims for carrier payments related to multiple employment that are not submitted within the required timeframe will not be reviewed for reimbursement. These requests shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the carrier is seeking reimbursement or refund;

(2) a detailed payment record showing the dates of payments, the amounts of the payments, purpose of payments, total amount of payment requested, the payees, and the periods of benefits paid, as well as documentation that shows that the overpayment was unrecoupable as described in subsection (b), if applicable;

(3) the name, address, and federal employer identification number of the payee for any reimbursement or refund that may be due;

(4) all information documenting wage amounts from all non claim employment held at the time of the work related injury pursuant to §122.5 of this title (relating to Employee's Multiple Employment Wage Statement.); and

(5) all information documenting the wage amounts paid based on employment with the claim employer.

(f) Requests for reimbursement attributable to initial pharmaceutical coverage shall be submitted in the same or in the following fiscal year after a determination that the injury is not compensable in accordance with subsection (a)(4) of this section. The fiscal year begins each September 1st and ends on August 31st of the next calendar year. For example, if an injury is determined to be not compensable during the fiscal year from 9/1/02 through 8/31/03, the request for reimbursement pursuant to §413.0141 must be submitted prior to 8/31/04. Any claims for carrier payments related to initial pharmaceutical coverage that are not submitted within the required timeframe will not be reviewed for reimbursement. The requests shall be filed with the SIF administrator in writing and include:

(1) a claim-specific summary of the reason the carrier is seeking reimbursement or refund;

(2) a detailed payment record showing the dates of payments, specifically including documentation of payment of Initial Pharmaceutical Coverage, (i.e., first seven days following the date of injury); the amounts of the payments, the purpose of payments, total amount of payment requested, the payees, and the periods of benefits paid;

(3) the name, address, and federal employer identification number of the payee for any reimbursement or refund that may be due;

(4) copies of any prescription filled and documentation that the pharmaceutical services were provided during the first seven days following the date of injury, not counting the actual date the injury occurred; and

(5) documentation of the final resolution of any dispute which determines the injury is not compensable either from the commission or court of last resort.

(g) Any other documentation reasonably required by the SIF administrator to determine entitlement to reimbursement or payment from the SIF and the amount of reimbursement to which the carrier is entitled.

§116.12. Subsequent Injury Fund Payment/Reimbursement Schedule.

(a) Claims against the Subsequent Injury Fund (SIF) shall be paid in the following priority:

(1) claims by carriers for reimbursement made pursuant to §403.007 of the Act and §132.10(g) of this title (relating to Payment of Death Benefits to the Subsequent Injury Fund);

(2) claims by injured workers for lifetime benefits, as provided by §408.162 of the Act;

(3) claims by carriers for reimbursement, made pursuant to §410.209 and §413.055 of the Act and §116.11 of this title (relating to Request for Reimbursement or Refund from the Subsequent Injury Fund).; and

(4) claims by carriers for reimbursement made pursuant to §408.042(g) of the Act relating to multiple employment and those in accordance with commission rule(s) adopted pursuant to §413.0141 of the Act relating to initial pharmaceutical coverage.

(b) The SIF uses the fiscal year September 1 through August 31.

(c) Claims described in subsection (a)(1), (a)(2) and (a)(3) of this section may be reviewed and ordered paid by the SIF administrator at any time during the fiscal year.

(d) Following the end of the fiscal year, the administrator of the SIF shall review:

(1) the SIF available balance and projected revenues and liabilities;

(2) the current claims against the SIF, in the order of priorities set out in subsection (a) of this section; and

(3) all completed requests for reimbursement as described in §116.11 and §132.10 of this title, received during the prior fiscal year, except as provided in subsection (g) of this section.

(e) In accordance with §403.006(d) of the Act, if the commission determines that partial payments of the claims described in subsection (a)(4) of this section is necessary, partial payments shall be calculated in the following manner:

(1) The total amount of completed eligible requests for reimbursement submitted under subsection (a)(4) of this section that are received during the previous fiscal year will be used to establish a baseline amount.

(2) The baseline amount will be divided by the total amount of SIF funding available as determined in accordance with the Act.

(3) The resulting fraction will be equally applied to all claims submitted under subsection (a)(4) to determine the partial reimbursement amount.

(4) If reimbursement requests are paid with partial payments, no further future recovery is available from the subsequent injury fund for the non-reimbursed portion of that particular request.

(f) Following the end of each fiscal year, the SIF administrator shall, no later than October 30, enter appropriate orders for claims described in subsection (a)(3) of this section. The order shall specify the amount the SIF shall pay to the carrier.

(g) The SIF administrator shall submit orders to the state comptroller for payment and send a copy of the order to the requesting carrier.

(h) The SIF administrator will refrain from acting on a carrier's request for reimbursement or refund from the SIF until final resolution of the claim by a final decision of the commission, State Office of Administrative Hearings or the court of last resort except as provided in §116.11(a)(3) and (4).

This agency 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 July 26, 2002.

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Susan Cory
General Counsel
Texas Workers' Compensation Commission
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For further information, please call: (512) 804-4287

CHAPTER 134. BENEFITS-GUIDELINES FOR MEDICAL SERVICES, CHARGES, AND PAYMENTS

SUBCHAPTER K. TREATMENT GUIDELINES

28 TAC §§134.1000 - 134.1003

The Texas Workers' Compensation Commission (the commission) adopts the repeal of §134.1000, concerning the Mental Health Treatment Guideline; §134.1001, concerning the Spine Treatment Guideline; §134.1002 concerning the Upper Extremities Treatment Guideline; and §134.1003, concerning the Lower Extremities Treatment Guideline as proposed in the March 8, 2002 issue of the *Texas Register* (27 TexReg 1661).

As required by the Government Code §2001.033(1), the commission's reasoned justification for the repeal of these rules is set out in this order, which includes the preamble, which in turn includes the rule. This preamble contains a summary of the factual basis of the rule, a summary of comments received from interested parties, names of those groups and associations who commented and whether they were for or against adoption of the rule, and the reasons why the commission disagrees with some of the comments and proposals.

The repeal of §§134.1000-134.1003 is necessitated by House Bill 2600 (HB-2600), adopted during the 77th Texas Legislative Session, 2001, which states that treatment guidelines adopted under Chapter 413 of the Texas Labor Code and in effect immediately before September 1, 2001, are abolished on January 1, 2002. Sections 134.1000-134.1003 contain the treatment guidelines referred to by HB-2600. Although these treatment guidelines have already been abolished by statute effective January 1, 2002, these repeals implement this legislative action by removing these guidelines from the Texas Administrative Code.

Because the commission's treatment guidelines have been repealed, payment exception code T (which indicates a denial of payment because the treatments/services fall outside the parameters in the commission's treatment guidelines and are not shown to be medically necessary), should not be used for dates

of service on or after January 1, 2002 (the effective date of the statutory repeal). If the commission adopts treatment guidelines in the future, payment exception code T may again be appropriate for use.

Comments generally supporting the proposed repeals were received from the following groups: Insurance Council of Texas and Barron Risk Management. Comments generally opposing the proposed repeals were received from an individual.

Summaries of the comments and commission responses are as follows:

COMMENT: Commenters expressed support of the repeal of the treatment guidelines, suggesting it needed to be done for a long time, and that it is a "good clean up" effort to remove these rules from the Texas Administrative Code.

RESPONSE: The commission agrees.

COMMENT: Commenter felt the use of well researched industry recognized standards should result in better cost containment. However, commenter also felt that the repeal of these rules would result in increased costs to certified utilization review organizations because screening criteria must be used to replace the treatment guidelines, which are more costly than copies of the treatment guidelines.

RESPONSE: The commission agrees that, as provided in §413.011(e) of the Act, "the commission by rule may adopt treatment guidelines" and that "If adopted, treatment guidelines must be nationally recognized, scientifically valid, and outcome-based and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care." However, proposal of such treatment guidelines are not included in this commission action to formally repeal the treatment guidelines that were in effect immediately before September 1, 2001, and were legislatively abolished as of January 1, 2002. If the commission decides in the future to propose use of treatment guidelines, achieving better cost containment would be one consideration. Because the Texas Department of Insurance already requires certified utilization review organizations to use screening criteria for approvals, the repeal of these treatment guidelines does not impose an added cost to these entities.

COMMENT: Commenter opposed the removal and repeal of the treatment guidelines before the implementation of new ones as this will cause the injured employee to be without a tool for gauging the quality of health care being provided, will leave doctors without acceptable guidelines for patient care, and will leave insurance carriers as the "gate keepers" for patient care.

RESPONSE: The commission disagrees. The Act does not require the commission to adopt treatment guidelines or to replace treatment guidelines being repealed. The treatment guidelines that were in effect immediately before September 1, 2001, have already been legislatively abolished as of January 1, 2002. Abolishment of these guidelines does not leave system participants without knowledge of what is quality health care.

In the fall of 2001, the Commission proposed adoption of a treatment guideline and a work release guideline. Questions arose concerning the cost to workers' compensation system participants to purchase or access these guidelines. Also raised in comments were issues relating to the Medicare payment policies that were being adopted as required by HB-2600, the effect these policies might have on medical treatment, and whether the treatment guidelines proposed for adoption might be inconsistent with these Medicare payment policies. Because of these concerns, the proposals were withdrawn. No decision has yet been made as to possible future action on adopting treatment or work release guidelines.

The repeals are adopted under: the Texas Labor Code §402.061, which authorizes the commission to adopt rules necessary to administer the Act; the Texas Labor Code §413.011 which requires the commission by rule to establish medical policies relating to necessary treatments for injuries and designed to ensure the quality of medical care and to achieve effective medical cost control and to enhance a timely and appropriate return to work; the Texas Labor Code §413.012, which requires the Commission to review and revise medical policies and fee guidelines at least every two years to reflect current medical treatment and fees that are reasonable and necessary; and HB-2600, 77th Texas Legislative Session, 2001, Article 6, Section 6.09(b), which provides that the treatment guidelines adopted under Chapter 413, Texas Labor Code, in effect immediately before September 1, 2001 are abolished on January 1, 2002

The repeals are adopted under: the Texas Labor Code §402.061, §413.011, §413.012, House Bill 2600, 77th Texas Legislative Session, 2001, Article 6, Section 6.09(b).

This agency 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 1. PURPOSE OF RULES, GENERAL PROVISIONS

30 TAC §1.12

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §1.12. Section 1.12 is adopted *without change* to the proposed text as published in the April 26, 2002, issue of the *Texas Register* (27 TexReg 3449) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of this rulemaking is to implement legislation relating to public notice requirements. House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, §1.12, amended Texas Water Code (TWC), Chapter 5, Subchapter D, by adding, among other sections, §5.129, Summary for Public Notices. New §1.12 addresses the

requirements of new TWC, §5.129, which sets forth content of public notice requirements.

SECTION DISCUSSION

The commission adopts new §1.12, Summary for Public Notices, to address the requirement of TWC, §5.129, as added by HB 2912, which provides that the commission, by rule, shall require that public notices include a succinct beginning statement of the subject of the notice. Generally, new §1.12 mirrors the statutory provisions. Since the provisions of this new statute are applicable to all public notices relating to any matter under the commission's jurisdiction for which public notice is required, this provision is added to Chapter 1 of the commission rules due to the broad applicability of this chapter.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures concerning public notice, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact analysis is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adopted rule does not exceed a standard set by federal law. The adopted rule does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal state agency procedures; as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the rulemaking is in direct response to HB 2912 and does not exceed the requirements of this bill. This rule does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. This rule is not adopted solely under the general powers of the agency, but rather under specific state laws (i.e., Texas Government Code, §2001.004 and TWC, §5.129). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this adopted rule and performed an assessment of whether the rule is subject to Texas Government Code, Chapter 2007. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for public notice. As added by HB 2912, TWC, §5.129 requires that public notices include a succinct beginning statement of the subject of the notice. The adopted rule will substantially advance this stated purpose by providing specific procedural requirements in response to legislative changes. Promulgation and enforcement of the rule will not burden private real property. The rule does 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 governmental action. Consequently, the rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management 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. The rulemaking action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 *et seq*.).

PUBLIC COMMENT

A public hearing on the proposal was scheduled to be held in Austin on May 21, 2002. No public comment was offered at the scheduled hearing, so a hearing was not held. Furthermore, no commenters submitted written comments during the comment period which closed at 5:00 p.m., May 28, 2002.

STATUTORY AUTHORITY

The new section is adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §5.129, which requires that public notices include a succinct beginning statement of the subject of the notice.

This agency 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 July 26, 2002.

TRD-200204693
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 15, 2002
Proposal publication date: April 26, 2002
For further information, please call: (512) 239-0348

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CHAPTER 39. PUBLIC NOTICE

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§39.403, 39.405, 39.501, and 39.503. Sections 39.403, 39.405, 39.501, and 39.503 are adopted *with changes* to the proposed text as published in the April 26, 2002, issue of the *Texas Register* (27 TexReg 3465).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of this rulemaking is to implement legislation relating to public notice and meeting requirements. House Bill (HB) 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Legislature, 2001, §2.01, added Texas Health and Safety Code (THSC), §361.0666, Public Meeting and Notice for Solid Waste Facilities. The adopted amendments to §39.501 and §39.503 address the amendments to THSC, §361.0666, which added certain public meeting requirements for facilities that accept municipal solid waste. HB 2947 (an act relating to the posting of notice for water discharge permits), 77th Legislature, 2001, amended Texas Water Code (TWC), §5.552, Notice of Intent to Obtain Permit. The adopted amendments to §39.405 address the requirements of amended TWC, §5.552 relating to newspaper publication requirements. Senate Bill (SB) 688 (an act relating to requirements for public notice and hearing on applications for certain permits that may have environmental impact) added new Texas Clean Air Act (TCAA), §382.05197, and changed the public notice requirements applicable to multiple plant permits. The amendments to §39.403 address the requirements of new TCAA, §382.05197. The adoption also contains grammatical and statutory reference revisions, cross-reference corrections, and changes which conform the rule language to *Texas Register* and agency formatting requirements.

SECTION BY SECTION DISCUSSION

Section 39.403, Applicability, is amended to address requirements of new TCAA, §382.05197, relating to notice and hearing requirements for multiple plant permit applications. Adopted new subsection (b)(13) makes notices for multiple plant permits subject to applicable requirements under Chapter 39. Existing subsection (b)(13) is redesignated as subsection (b)(14). Subsection (d) is amended to specify that initial issuance, amendment, or revocation of certain multiple plant permit applications is subject to the same public notice requirements that apply to initial issuance of voluntary emission reduction permits and initial issuance of electric generating facility permits except as otherwise provided in 30 TAC §116.1040 (as adopted for amendment concurrently in this issue of the *Texas Register*). Subsection (d) is also amended to correct the referenced title of §39.606. New TCAA, §382.05197(c) provides that public participation for a multiple plant permit application filed before September 1, 2001, will occur in the same manner as provided by TCAA, §382.0561, Federal Operating Permit, and §382.0562, Notice of Decision. Section 39.403 as adopted reflects the existing Chapter 39 requirements that will apply to multiple plant permits.

Section 39.403(a)(3) and §39.405(a), (c), and (e) are amended to reformat the cross-references to Subchapter G for improved readability.

Section 39.405(f), concerning general notice provisions, is amended to address the HB 2947 requirement that certain notices of intent to obtain a permit must be published in a newspaper of general circulation in a municipality, if the facility to which the application relates is located or proposed to be located in the municipality. Section 39.405(f) is also amended to make clear that the requirements of HB 2947 do not apply to air applications which remain subject to the newspaper publication requirements of TCAA, §382.056(a), and was unchanged by HB 2947. Grammatical revisions to proposed §39.405 were made which conform with *Texas Register* and agency formatting requirements.

Section 39.501 and §39.503 are amended to address the public meeting and notice requirements for solid waste facilities under the HB 2912, Article 2 amendments to THSC, §361.0666. These amendments require an applicant for a permit under THSC, Chapter 361, for a new facility that would accept municipal solid waste, to hold a public meeting in the county in which the proposed facility is to be located, and publish notice of the public meeting. Since under certain circumstances, industrial or hazardous waste facilities may also accept municipal solid wastes, the adopted rules make changes to both the rules that apply to municipal solid waste permits and the rules that apply to industrial or hazardous waste permits. As required by THSC, §361.0666(d), the content of notice for these public meetings is prescribed. Finally, because existing §39.405(e) already requires applicants to submit affidavits certifying compliance with notice requirements, no other changes are adopted to implement the new statutory requirements. Grammatical revisions to proposed §39.501(c)(1) and §39.503(c)(1) were made for improved readability by replacing the first word "On" with the word "Upon."

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures concerning public notice and public meetings, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rules are major environmental rules, a regulatory impact analysis is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. These adopted rules do not exceed a standard set by federal law. These adopted rules do not exceed an express requirement of state law because they are authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal state agency procedures; as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to HB 2912, HB 2947, and SB 688, and does not exceed the requirements of these bills. This adoption does not exceed a requirement of a delegation agreement or contract between the

state and an agency or representative of the federal government to implement a state and federal program. This rulemaking action does not adopt a rule solely under the general powers of the agency, but rather under specific state laws (i.e., Texas Government Code, §2001.004; TWC, §5.552; and THSC, §361.0666 and §382.05197). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rules are subject to Texas Government Code, Chapter 2007. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for public notice and public meetings. As added by HB 2947, TWC, §5.552 requires that certain notices of intent to obtain a permit must be published in a newspaper of general circulation in a municipality, if the facility to which the application relates is located or proposed to be located in the municipality. As added by HB 2912, THSC, §361.0666 requires that an applicant for a permit under THSC, Chapter 361, for a new facility that would accept municipal solid waste, must hold a public meeting in the county in which the proposed facility is to be located before the 45th day after the application is filed. SB 688 added THSC, §382.05197, which changed the public notice requirements applicable to certain multiple plant permits. The adopted rules will substantially advance these stated purposes by providing specific procedural requirements in response to legislative changes. Promulgation and enforcement of the rules will not burden private real property. The adopted rules 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 governmental action. Consequently, the rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management 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. The rulemaking action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (31 TAC Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 *et seq*.).

PUBLIC COMMENT

A public hearing on the proposal was scheduled to be held in Austin on May 21, 2002. No public comment was offered at the scheduled hearing, so a hearing was not held. Furthermore, no commenters submitted written comments during the comment period which closed at 5:00 p.m., May 28, 2002.

SUBCHAPTER H. APPLICABILITY AND GENERAL PROVISIONS

30 TAC §39.403, §39.405

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.552, which requires that certain notices of intent to obtain a permit must be published in a newspaper of general circulation in a municipality, if the facility to which the application relates is located or proposed to be located in the municipality; THSC, §361.0666, which requires that an applicant for a permit under THSC, Chapter 361, for a new facility that accepts municipal solid waste hold a public meeting in the county in which the proposed facility is to be located before the 45th day after the application is filed; and THSC, §382.05197, which sets forth certain notice requirements for multiple plant permits.

§39.403. Applicability.

(a) Permit applications that are declared administratively complete on or after September 1, 1999 are subject to Subchapters H - M of this chapter (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications and Water Quality Management Plans; Public Notice of Air Quality Applications; Public Notice of Injection Well and Other Specific Applications; and Public Notice for Radioactive Material Licenses). Permit applications that are declared administratively complete before September 1, 1999 are subject to Subchapters A - E of this chapter (relating to Applicability and General Provisions; Public Notice of Solid Waste Applications; Public Notice of Water Quality Applications; Public Notice of Air Quality Applications; and Public Notice of Other Specific Applications). All consolidated permit applications are subject to Subchapter G of this chapter (relating to Public Notice for Applications for Consolidated Permits). The effective date of the amendment of existing §39.403, specifically with respect to subsection (c)(9) and (10), is June 3, 2002. Applications for modifications filed before this amended section becomes effective will be subject to this section as it existed prior to June 3, 2002.

(1) Explanation of applicability. Subsection (b) of this section lists all the types of applications to which Subchapters H - M of this chapter apply. Subsection (c) of this section lists certain types of applications that would be included in the applications listed in subsection (b) of this section, but that are specifically excluded. Subsections (d) and (e) of this section specify that only certain sections apply to applications for radioactive materials licenses or voluntary emission reduction permits.

(2) Explanation of organization. Subchapter H of this chapter contains general provisions that may apply to all applications under Subchapters H - M of this chapter. Additionally, in Subchapters I - M of this chapter, there is a specific subchapter for each type of application. Those subchapters contain additional requirements for each type of application, as well as indicating which parts of Subchapter H of this chapter must be followed.

(3) Types of applications. Unless otherwise provided in Subchapters G - M of this chapter, public notice requirements apply to applications for new permits, concrete batch plant air quality exemptions from permitting or permits by rule, and applications to amend, modify, or renew permits.

(b) As specified in those subchapters, Subchapters H - M of this chapter apply to notices for:

(1) applications for municipal solid waste, industrial solid waste, or hazardous waste permits under Texas Health and Safety Code (THSC), Chapter 361;

(2) applications for wastewater discharge permits under Texas Water Code (TWC), Chapter 26, including:

(A) applications for the disposal of sewage sludge or water treatment sludge under Chapter 312 of this title (relating to Sludge Use, Disposal, and Transportation); and

(B) applications for individual permits under Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(3) applications for underground injection well permits under TWC, Chapter 27, or under THSC, Chapter 361;

(4) applications for production area authorizations under Chapter 331 of this title (relating to Underground Injection Control);

(5) contested case hearings for permit applications or contested enforcement case hearings under Chapter 80 of this title (relating to Contested Case Hearings);

(6) applications for radioactive material licenses under Chapter 336 of this title (relating to Radioactive Substance Rules), except as provided in subsection (e) of this section;

(7) applications for consolidated permit processing and consolidated permits processed under TWC, Chapter 5, Subchapter J, and Chapter 33 of this title (relating to Consolidated Permit Processing);

(8) applications for air quality permits under THSC, §382.0518 and §382.055. In addition, applications for permit amendments under §116.116(b) of this title (relating to Changes to Facilities), initial issuance of flexible permits under Chapter 116, Subchapter G of this title (relating to Flexible Permits), amendments to flexible permits under §116.710(a)(2) and (3) of this title (relating to Applicability) when an action involves:

(A) construction of any new facility as defined in §116.10(4) and (10) of this title (relating to General Definitions);

(B) modification of an existing facility as defined in §116.10(9) of this title which result in an increase in allowable emissions of any air contaminant emitted equal to or greater than the emission quantities defined in §106.4(a)(1) of this title (relating to Requirements for Exemptions from Permitting) and of sources defined in §106.4(a)(2) and (3) of this title; or

(C) other changes when the executive director determines that:

(i) there is a reasonable likelihood for emissions to impact a nearby sensitive receptor;

(ii) there is a reasonable likelihood of high nuisance potential from the operation of the facilities;

(iii) the application involves a facility or site for which the compliance history contains violations which are unresolved or constitute a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process; or

(iv) there is a reasonable likelihood of significant public interest in a proposed activity;

(9) applications subject to the requirements of Chapter 116, Subchapter C of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 Code of Federal Regulations Part 63)), whether for construction or reconstruction;

(10) concrete batch plants registered under Chapter 106 of this title (relating to Exemptions from Permitting) unless the facility is to be temporarily located in or contiguous to the right-of-way of a public works project;

(11) applications for voluntary emission reduction permits under THSC, §382.0519;

(12) applications for permits for electric generating facilities under Texas Utilities Code, §39.264;

(13) applications for multiple plant permits (MPPs) under THSC, §382.05194; and

(14) Water Quality Management Plan (WQMP) updates processed under TWC, Chapter 26, Subchapter B.

(c) Notwithstanding subsection (b) of this section, Subchapters H - M of this chapter do not apply to the following actions and other applications where notice or opportunity for contested case hearings are otherwise not required by law:

(1) applications for authorizations under Chapter 321 of this title (relating to Control of Certain Activities by Rule), except for applications for individual permits under Subchapter B of that chapter;

(2) applications for registrations and notifications under Chapter 312 of this title;

(3) applications under Chapter 332 of this title (relating to Composting);

(4) applications under Chapter 122 of this title (relating to Federal Operating Permits);

(5) applications under Chapter 116, Subchapter F of this title (relating to Standard Permits);

(6) applications under Chapter 106 of this title, except for concrete batch plants specified in subsection (b)(10) of this section.

(7) applications under §39.15 of this title (relating to Public Notice Not Required for Certain Types of Applications) without regard to the date of administrative completeness;

(8) applications for minor amendments under §305.62(c)(2) of this title (relating to Amendment). Notice for minor amendments shall comply with the requirements of §39.17 of this title (relating to Notice of Minor Amendment) without regard to the date of administrative completeness;

(9) applications for Class 1 modifications of industrial or hazardous waste permits under §305.69(b) of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). Notice for Class 1 modifications shall comply with the requirements of §39.105 of this title (relating to Application for a Class 1 Modification of an Industrial Solid Waste or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 of this title (relating to Text of Public Notice) and §305.69(b) of this title;

(10) applications for modifications of municipal solid waste permits and registrations under §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications). Notice for modifications shall comply with the requirements of §39.106 of this title (relating to Application for Modification of a Municipal Solid Waste Permit or Registration), without regard to the date of administrative completeness;

(11) applications for Class 2 modifications of industrial or hazardous waste permits under §305.69(c) of this title. Notice for Class 2 modifications shall comply with the requirements of §39.107 of this title (relating to Application for a Class 2 Modification of an Industrial or Hazardous Waste Permit), without regard to the date of administrative completeness, except that text of notice shall comply with §39.411 and §305.69(c) of this title;

(12) applications for minor modifications of underground injection control permits under §305.72 of this title (relating to Underground Injection Control (UIC) Permit Modifications at the Request of the Permittee);

(13) applications for minor modifications of Texas Pollutant Discharge Elimination System (TPDES) permits under §305.62(c)(3) of this title; or

(14) applications for registration and notification of sludge disposal under §312.13 of this title (relating to Actions and Notice).

(d) Applications for initial issuance of voluntary emission reduction permits under THSC, §382.0519 and initial issuance of electric generating facility permits under Texas Utilities Code, §39.264 are subject only to §39.405 of this title (relating to General Notice Provisions), §39.409 of this title (relating to Deadline for Public Comment, and for Requests for Reconsideration, Contested Case Hearing, or Notice and Comment Hearing), §39.411 of this title, §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit), §39.602 of this title (relating to Mailed Notice), §39.603 of this title (relating to Newspaper Notice), §39.604 of this title (relating to Sign-Posting), §39.605 of this title (relating to Notice to Affected Agencies), and §39.606 of this title (relating to Alternative Means of Notice for Grandfathered Facilities), except that any reference to requests for reconsideration or contested case hearings in §39.409 or §39.411 of this title shall not apply. For MPP applications filed before September 1, 2001, the initial issuance, amendment, or revocation of MPPs under THSC, §382.05194 is subject to the same public notice requirements that apply to initial issuance of voluntary emission reduction permits and initial issuance of electric generating facility permits, except as otherwise provided in §116.1040 of this title (relating to Multiple Plant Permit Public Notice and Public Participation).

(e) Applications for Radioactive Materials Licenses under Chapter 336 of this title are not subject to §§39.405(c) and (e), 39.418 - 39.420, and certain portions of §39.413 of this title (relating to Mailed Notice).

§39.405. General Notice Provisions.

(a) Failure to publish notice. If the chief clerk prepares a newspaper notice that is required by Subchapters G - M of this chapter (relating to Public Notice for Applications for Consolidated Permits, Applicability and General Provisions, Public Notice of Solid Waste Applications, Public Notice of Water Quality Applications and Water Quality Management Plans, Public Notice of Air Quality Applications, Public Notice of Injection Well and Other Specific Applications, and Public Notice for Radioactive Material Licenses) and the applicant does not cause the notice to be published within 45 days of mailing of the notice from the chief clerk, or for Notice of Receipt of Application and Intent to Obtain Permit, within 30 days after the executive director declares the application administratively complete, or fails to submit the copies of notices or affidavit required in subsection (e) of this section, the executive director may cause one of the following actions to occur.

(1) The chief clerk may cause the notice to be published and the applicant shall reimburse the agency for the cost of publication.

(2) The executive director may suspend further processing or return the application. If the application is resubmitted within six months of the date of the return of the application, it shall be exempt from any application fee requirements.

(b) Electronic mailing lists. The chief clerk may require the applicant to provide necessary mailing lists in electronic form.

(c) Mail or hand delivery. When Subchapters G - L of this chapter require notice by mail, notice by hand delivery may be substituted. Mailing is complete upon deposit of the document, enclosed in a prepaid, properly addressed wrapper, in a post office or official depository of the United States Postal Service. If hand delivery is by courier-receipted delivery, the delivery is complete upon the courier taking possession.

(d) Combined notice. Notice may be combined to satisfy more than one applicable section of this chapter.

(e) Notice and affidavit. When Subchapters G - L of this chapter require an applicant to publish notice, the applicant must file a copy of the published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of the published notice which shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is 30 calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. When the chief clerk publishes notice under subsection (a) of this section, the chief clerk shall file a copy of the published notice and a publisher's affidavit.

(f) Published notice. When this chapter requires notice to be published under this subsection:

(1) the applicant shall publish notice in the newspaper of largest circulation in the county in which the facility is located or proposed to be located or, if the facility is located or proposed to be located in a municipality, the applicant shall publish notice in any newspaper of general circulation in the municipality. For air applications subject to §39.603 of this title (relating to Newspaper Notice), applicants shall instead publish notice as required by that rule; and

(2) for applications for solid waste permits and injection well permits, the applicant shall publish notice in the newspaper of largest general circulation that is published in the county in which the facility is located or proposed to be located. If a newspaper is not published in the county, the notice must be published in any newspaper of general circulation in the county in which the facility is located or proposed to be located. The requirements of this subsection may be satisfied by one publication if the newspaper is both published in the county and is the newspaper of largest general circulation in the county.

(g) The applicant shall make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located. If the application is submitted with confidential information marked as confidential by the applicant, the applicant shall indicate in the public file that there is additional information in a confidential file. The copy of the application shall comply with the following.

(1) A copy of the administratively complete application must be available for review and copying beginning on the first day of newspaper publication of Notice of Receipt of Application and Intent to Obtain Permit and remain available for the publications' designated comment period.

(2) A copy of the complete application (including any subsequent revisions to the application) and executive director's preliminary decision must be available for review and copying beginning on

the first day of newspaper publication required by this section and remain available until the commission has taken action on the application or the commission refers issues to SOAH.

This agency 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 July 26, 2002.

TRD-200204694
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: August 15, 2002
Proposal publication date: April 26, 2002
For further information, please call: (512) 239-0348

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SUBCHAPTER I. PUBLIC NOTICE OF SOLID WASTE APPLICATIONS

30 TAC §39.501, §39.503

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TWC, §5.552, which requires that certain notices of intent to obtain a permit must be published in a newspaper of general circulation in a municipality, if the facility to which the application relates is located or proposed to be located in the municipality; THSC, §361.0666, which requires that an applicant for a permit under THSC, Chapter 361, for a new facility that accepts municipal solid waste hold a public meeting in the county in which the proposed facility is to be located before the 45th day after the application is filed; and THSC, §382.05197, which sets forth certain notice requirements for multiple plant permits.

§39.501. Application for Municipal Solid Waste Permit.

(a) Applicability. This section applies to applications for municipal solid waste (MSW) permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication local review committee process. If an applicant for an MSW permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit to the executive director a notice of intent to file an application, setting forth the proposed location and type of facility. The executive director shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. The executive director shall also mail notice to the appropriate regional solid waste planning agency or council of government. The mailing shall be by certified mail.

(c) Notice of Receipt of Application and Intent to Obtain a Permit.

(1) Upon the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located.

(2) After the executive director determines that the application is administratively complete:

(A) notice shall be given as required by §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit) and, if a newspaper is not published in the county, then the applicant shall publish notice in a newspaper of circulation in the immediate vicinity in which the facility is located or proposed to be located. This notice must contain the text as required by §39.411(b)(1) - (9), (11), and (12) of this title (relating to Text of Public Notice);

(B) the chief clerk shall publish Notice of Receipt of Application and Intent to Obtain Permit in the *Texas Register*; and

(C) the executive director or chief clerk shall mail Notice of Receipt of Application and Intent to Obtain Permit, along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) shall be published once as required by §39.405(f)(2) of this title (relating to General Notice Provisions). The notice shall be published after the chief clerk has mailed the Notice of Application and Preliminary Decision to the applicant. The notice must contain the text as required by §39.411(c)(1) - (6) of this title.

(e) Notice of public meeting.

(1) If an applicant proposes a new facility:

(A) the agency shall hold a public meeting in the county in which the facility is proposed to be located to receive public comment concerning the application; and

(B) the applicant shall hold a public meeting in the county in which the facility is proposed to be located. This meeting must be held before the 45th day after the date the application is filed.

(2) A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of paragraph (1)(A) of this subsection if public notice is provided under this subsection.

(3) The applicant shall publish notice of any public meeting under this subsection, in accordance with §39.405(f)(2) of this title, once each week during the three weeks preceding a public meeting. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters). For public meetings under paragraph (1)(B) of this subsection, the notice of public meeting is not subject to §39.411(d) of this title, but instead shall contain at least the following information:

(A) permit application number;

(B) applicant's name;

(C) proposed location of the facility;

(D) location and availability of copies of the application;

(E) location, date, and time of the public meeting; and

(F) name, address, and telephone number of the contact person for the applicant from whom interested persons may obtain further information.

(4) For public meetings held by the agency under paragraph (1)(A) of this subsection, the chief clerk shall mail notice to the persons listed in §39.413 of this title (relating to Mailed Notice).

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings).

(2) The applicant shall publish notice at least once under §39.405(f)(2) of this title.

(3) Mailed notice.

(A) If the applicant proposes a new facility, the applicant shall mail notice of the hearing to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend a permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) Notice under paragraphs (2) and (3)(B) of this subsection shall be completed at least 30 days before the hearing.

§39.503. Application for Industrial or Hazardous Waste Facility Permit.

(a) Applicability. This section applies to applications for industrial or hazardous waste facility permits that are declared administratively complete on or after September 1, 1999.

(b) Preapplication requirements.

(1) If an applicant for an industrial or hazardous waste facility permit decides to participate in a local review committee process under Texas Health and Safety Code, §361.063, the applicant must submit a notice of intent to file an application to the executive director, setting forth the proposed location and type of facility. The applicant shall mail notice to the county judge of the county in which the facility is to be located. If the proposed facility is to be located in a municipality or the extraterritorial jurisdiction of a municipality, a copy of the notice shall also be mailed to the mayor of the municipality. Mailed notice shall be by certified mail. When the applicant submits the notice of intent to the executive director, the applicant shall publish notice of the submission in a paper of general circulation in the county in which the facility is to be located.

(2) The requirements of this paragraph are set forth at 40 Code of Federal Regulations (CFR) §124.31(b) - (d), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, and apply to all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, where the renewal application is proposing a significant change in facility operations. For the purposes of this paragraph, a "significant change" is any change that would qualify as a Class 3 permit modification under §305.69 of this title (relating to Solid Waste Permit Modification at the Request of the Permittee). The requirements of this paragraph do not apply to an application for minor amendment under §305.62 of this title (relating to Amendment), correction under §50.45 of this title (relating to Corrections to Permits), or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit, where the renewal application is proposing a significant change in facility operations.

(c) Notice of Receipt of Application and Intent to Obtain Permit.

(1) Upon the executive director's receipt of an application, or notice of intent to file an application, the chief clerk shall mail notice to the state senator and representative who represent the area in which the facility is or will be located and to the persons listed in §39.413 of this title (relating to Mailed Notice). For all hazardous waste part B applications for initial permits for hazardous waste management units, hazardous waste part B permit applications for major amendments, and hazardous waste part B applications for renewal of permits, the chief clerk shall provide notice to meet the requirements of this subsection and 40 CFR §124.32(b), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, and the executive director shall meet the requirements of 40 CFR §124.32(c), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417. The requirements of this paragraph relating to 40 CFR §124.32(b) - (c) do not apply to an application for minor amendment under §305.62 of this title, correction under §50.45 of this title, or modification under §305.69 of this title, or to an application that is submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility, unless the application is also for an initial permit for hazardous waste management unit(s), or the application is also for renewal of the permit.

(2) After the executive director determines that the application is administratively complete:

(A) notice shall be given as required by §39.418 of this title (relating to Receipt of Application and Intent to Obtain Permit). Notice under §39.418 of this title will satisfy the notice of receipt of application required by §281.17(d) of this title (relating to Notice of Receipt of Application and Declaration of Administrative Completeness); and

(B) the executive director or chief clerk shall mail notice of this determination along with a copy of the application or summary of its contents to the mayor and health authority of a municipality in whose territorial limits or extraterritorial jurisdiction the solid waste facility is located, and to the county judge and the health authority of the county in which the facility is located.

(d) Notice of Application and Preliminary Decision. The notice required by §39.419 of this title (relating to Notice of Application and Preliminary Decision) shall be published once as required by §39.405(f)(2) of this title (relating to General Notice Provisions). In addition to the requirements of §39.419 of this title, the following requirements apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in each county which is adjacent or contiguous to each county in which the facility is located. One notice

may satisfy the requirements of §39.405(f)(2) of this title and of this subsection, if the newspaper meets the requirements of both rules.

(2) If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the application on one or more local radio stations that broadcast to an area that includes all of the county in which the facility is located. The executive director may require that the broadcasts be made to an area that also includes contiguous counties.

(3) The notice shall comply with §39.411 of this title (relating to Text of Public Notice). The deadline for public comments on industrial solid waste applications shall be not less than 30 days after newspaper publication, and for hazardous waste applications, not less than 45 days after newspaper publication.

(e) Notice of public meeting.

(1) If an applicant proposes a new hazardous waste facility, the agency shall hold a public meeting in the county in which the facility is to be located to receive public comment concerning the application.

(2) If an applicant proposes a major amendment of an existing hazardous waste facility permit, this subsection applies if a person affected files a request for public meeting with the chief clerk concerning the application before the deadline to file public comment or hearing requests.

(3) If an applicant proposes a new industrial or hazardous waste facility that would accept municipal solid waste, the applicant shall hold a public meeting in the county in which the facility is proposed to be located. This meeting must be held before the 45th day after the date the application is filed.

(4) A public meeting is not a contested case proceeding under the APA. A public meeting held as part of a local review committee process under subsection (b) of this section meets the requirements of paragraph (1) of this subsection if public notice is provided under this subsection.

(5) The applicant shall publish notice of any public meeting under this subsection, in accordance with §39.405(f)(2) of this title, once each week during the three weeks preceding a public meeting. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters). For public meetings under paragraph (3) of this subsection, the notice of public meeting is not subject to §39.411(d) of this title, but instead shall contain at least the following information:

(A) permit application number;

(B) applicant's name;

(C) proposed location of the facility;

(D) location and availability of copies of the application;

(E) location, date, and time of the public meeting; and

(F) name, address, and telephone number of the contact person for the applicant from whom interested persons may obtain further information.

(6) For public meetings held by the agency under paragraph (1) of this subsection, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(f) Notice of hearing.

(1) This subsection applies if an application is referred to SOAH for a contested case hearing under Chapter 80 of this title (concerning Contested Case Hearings).

(2) Newspaper notice.

(A) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located and in each county and area which is adjacent or contiguous to each county in which the proposed facility is located.

(B) If the application concerns a hazardous waste facility, the hearing must include one session held in the county in which the facility is located. The applicant shall publish notice of the hearing once each week during the three weeks preceding the hearing under §39.405(f)(2) of this title. The published notice shall be at least 15 square inches (96.8 square centimeters) with a shortest dimension of at least 3 inches (7.6 centimeters) or have a total size of at least 9 column inches (18 square inches). The text of the notice shall include the statement that at least one session of the hearing will be held in the county in which the facility is located.

(3) Mailed notice.

(A) If the applicant proposes a new solid waste management facility, the applicant shall mail notice to each residential or business address located within 1/2 mile of the facility and to each owner of real property located within 1/2 mile of the facility listed in the real property appraisal records of the appraisal district in which the facility is located. The notice shall be mailed to the persons listed as owners in the real property appraisal records on the date the application is determined to be administratively complete. The chief clerk shall mail notice to the persons listed in §39.413 of this title, except that the chief clerk shall not mail notice to the persons listed in paragraph (1) of that section. The notice must be mailed no more than 45 days and no less than 30 days before the hearing. Within 30 days after the date of mailing, the applicant must file with the chief clerk an affidavit certifying compliance with its obligations under this subsection. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with this subparagraph.

(B) If the applicant proposes to amend or renew an existing permit, the chief clerk shall mail notice to the persons listed in §39.413 of this title.

(4) If the application concerns a hazardous waste facility, the applicant shall broadcast notice of the hearing under subsection (d)(2) of this section.

(5) Notice under paragraphs (2)(A), (3), and (4) of this subsection shall be completed at least 30 days before the hearing.

(g) This section does not apply to applications for an injection well permit.

(h) Information repository. The requirements of 40 CFR §124.33(b) - (f), which is adopted by reference as amended and adopted in the CFR through December 11, 1995, at 60 FedReg 63417, apply to all applications for hazardous waste permits.

This agency 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 July 26, 2002.

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Proposal publication date: April 26, 2002
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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER J. MULTIPLE PLANT PERMITS

30 TAC §§116.1011, 116.1040 - 116.1042, 116.1050

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts amendments to §§116.1011, 116.1040, 116.1041, and 116.1050 and new §116.1042. Sections 116.1011, 116.1040, and 116.1042 are adopted *with changes* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3500). Sections 116.1041 and 116.1050 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of this rulemaking is to implement legislation relating to public notice and hearing requirements. Senate Bill (SB) 688 (an act relating to requirements for public notice and hearing on applications for certain permits that may have environmental impact), 77th Legislature, 2001, amended Texas Clean Air Act (TCAA), Chapter 382, Subchapter C, by amending §382.05194, Multiple Plant Permit, and by adding §382.05197, Multiple Plant Permit: Notice and Hearing. The adopted amendments and new section address the amendments to TCAA, Chapter 382, Subchapter C. The adoption also contains grammatical revisions, cross-reference corrections, and changes which conform the rule language to *Texas Register* and agency formatting requirements.

SECTION BY SECTION DISCUSSION

Section 116.1011, Multiple Plant Permit Application, is amended to reflect new statutory requirements under TCAA, §382.05197 for a multiple plant permit (MPP) applicant to publish notice of intent to obtain the permit. Subsection (a)(5) is deleted because information necessary to calculate the cost of public notice would no longer be needed by the executive director as part of the MPP application, since the rules now require the applicant, rather than the commission, to publish notice of intent to obtain the permit. Minor changes adopted under §116.1011 include substituting the term "executive director" for the "commission" to more accurately reflect agency duties and responsibilities; and changing the specific application references from "Form PI-1M Multiple Plant Permit Application" and "Form PI-1M" to "application form" or "form" to allow for ongoing improvements in commission application documents and flexibility under subsection (a). In a change from proposal, the acronym "MPP" was used in place of "multiple plant permit" in subsection (b) for consistency.

Section 116.1040, Multiple Plant Permit Public Notice and Public Participation, is amended to reflect the new statutory language under TCAA, §382.05197 by changing the title of this rule and by adding new language under subsections (a) - (c). The amended title of the rule reflects the inclusion of provisions to address new public participation procedures in the statute. New TCAA, §382.05197(c) provides that public participation for an MPP application filed before September 1, 2001, will occur in the same manner as provided by TCAA, §382.0561, concerning Federal Operating Permit; and §382.0562, concerning Notice of Decision. These sections allow for notice and comment hearings instead of contested case hearings under Texas Government Code, Chapter 2001, and require the executive director to send notice of final action to persons who comment during the comment period or during a hearing. Because the commission has developed public notice and participation requirements implementing similar language in TCAA, §382.05191 for voluntary emission reduction permits (VERP) and electric generating facility permits, the adopted requirements of §§116.1040 - 116.1042 are based on the sections in 30 TAC Chapter 116, Subchapters H and I, that implement the requirements of TCAA, §382.0561 and §382.0562. In addition, the commission's review of TCAA, §382.05194 and §382.05197 indicates that the new public notice and public participation requirements that substitute for otherwise applicable requirements under Texas Government Code, Chapter 2001, are only available for applications filed before September 1, 2001, for the initial issuance, amendment, or revocation of an MPP under §382.05194(e). As a general matter, the requirements in 30 TAC Chapter 50, relating to Action on Applications and Other Authorizations, and specifically the requirements in Subchapter G, relating to Action by the Executive Director, apply to all MPP applications regardless of the filing date for the applications.

The new language adopted under §116.1040(a) requires that applications for an MPP filed on or after September 1, 2001 are subject to the same procedural requirements of 30 TAC Chapters 39, 50, 55, and 80 that apply to applications processed under Chapter 116, Subchapter B, relating to New Source Review Permits, except that any required newspaper notice shall be published in accordance with proposed subsection (b)(1)(A).

New §116.1040(b) is based on language in §116.1041(c), and provides that the public notice and public participation process in TCAA, §382.05197, is only available for applications filed before September 1, 2001, for initial issuance, amendment, or revocation of an MPP. The new language adopted under paragraph (1) requires the applicant for an MPP application filed before September 1, 2001, to follow the same public notice requirements applicable to initial issuance VERPs and electric generating facility permits that are specified in §39.403(d), except as provided by §116.1040. New subparagraph (A) requires an applicant for initial issuance of an MPP to publish notice of intent to obtain the permit in accordance with the applicable requirements in §39.603, except that: the notice of a proposed MPP for existing facilities must be published in one or more state-wide or regional newspapers that provide reasonable notice throughout the state; or if the MPP for existing facilities will be effective for only part of the state, the notice must be published in a newspaper of general circulation in the area to be affected. For consistency with the statute, adopted subparagraph (B) clarifies that the notice required under §39.603 will include a statement that the persons identified in paragraph (2) of this subsection are entitled to request a notice and comment hearing from the commission. The new requirements adopted under subparagraph (C) allow the executive director to authorize an applicant for an MPP for an existing facility that constitutes or is part of a small business stationary source as defined in TCAA, §382.0365(h)(2), to

provide notice using an alternative means if the executive director finds that the proposed method will result in equal or better communication with the public, considering the effectiveness of the notice in reaching potentially affected persons, the cost, and the consistency with federal requirements.

For consistency with the statute, adopted paragraph (2) provides that any person who may be affected by emissions from a facility that is included in an MPP application under subsection (b) or a member of the legislature may request a notice and comment hearing on the MPP application within 30 days after publication of notice under §39.418, concerning Notice of Receipt of Application and Intent to Obtain Permit. In accordance with TCAA, §382.05197(c) and §382.0561, new paragraph (3) clarifies that a hearing relating to an MPP under subsection (b) will follow the procedures for a notice and comment hearing according to the amendments in §116.1041. New paragraph (4) provides that the executive director's response to public comments and notice of decision relating to a permit application under subsection (b) will be conducted under the procedures of new §116.1042. New paragraph (5) provides that persons affected by a decision of the executive director to issue or deny an MPP application under subsection (b) will be entitled to file a motion to overturn the decision under §50.139, relating to Motion to Overturn Executive Director's Decision, and may seek judicial review under TCAA, §382.032, Appeal of Commission Action. A clarifying change from proposal was made under paragraph (5) by deleting the term "as appropriate."

Adopted new §116.1040(c) specifies publication requirements for MPP renewals. Consistent with the statutory requirement in TCAA, §382.05197, new subsection (c) requires the state-wide or regional publication of any required newspaper notice when an applicant submits an application for renewal of an MPP. An MPP may potentially apply to facilities located in different areas of the state and the commission considers state-wide or regional publication an appropriate requirement for both initial issuance and renewal of an MPP. The commission is authorized to require this publication in new TCAA, §382.05197 and §382.056. The deletion of the rule language under §116.1040 reflects the deletion of the previously existing statutory language under TCAA, §382.05194(d).

Section 116.1041, Multiple Plant Permit Public Comment Procedures, is amended to reflect the new statutory language under TCAA, §382.05197(c) and (d), consistent with existing requirements for initial issuance of VERPs and electric generating facility permits to provide notice and comment hearings under TCAA, §382.0561 and §382.0562. The amended title of the rule reflects the inclusion of provisions to address new notice and comment hearing procedures in the statute. Adopted language in subsection (a) clarifies that the notice and comment hearing requirements in §116.1041 apply only to applications filed before September 1, 2001, for the initial issuance, amendment, or revocation of an MPP. New requirements adopted under subsection (b) allow the executive director to decide whether to hold a hearing based on the reasonableness of a request. The executive director is not required to hold a hearing if the basis of the request by a person who may be affected by emissions from a facility that is included in an MPP application is determined to be unreasonable. If a hearing is requested by a person who may be affected by emissions from an MPP facility, and that request is reasonable, the executive director will hold a hearing. Adopted new language in subsection (c) specifies that an applicant must provide newspaper notice of a hearing on a draft permit 30 days before the hearing in compliance with specific publication and notice content requirements. Adopted subsection (d) provides procedures for submitting hearing comments, and subsections (e) - (i) describe more specific procedures relating to the hearing record (including hearing recordings, written transcripts, and written comments), requirements relating to comments and supporting materials, and changes to the draft permit. New subsection (j) provides that the executive director will respond to comments as provided in §116.1042.

The deletion of the rule language under §116.1041(a) and (b) reflects the deletion of the previously existing language under TCAA, §382.05194(e) and (f), respectively. Previously existing subsection (c) is deleted because equivalent language is included in new §116.1040(b) consistent with TCAA, §382.05194(e).

New adopted §116.1042, Notice of Final Action, incorporates requirements in TCAA, §382.05197(c) and (d), and is consistent with existing procedures for initial issuance of VERPs and electric generating facility permits to provide notice of final decisions on applications under TCAA, §382.0561 and §382.0562. Subsection (a) specifies requirements for notice of final action for applications filed before September 1, 2001 for the initial issuance, amendment, or revocation of an MPP; and provides what must be included with the notice and who will receive the notice. Subsection (b) specifies what must be included in the notice of final action, including a statement about the opportunity to seek review under §50.139, relating to Motion to Overturn Executive Director's Decision, and to seek judicial review under TCAA, §382.032. In a change from proposal to make the rule internally consistent with §116.1040(b)(5), the proposed phrase concerning petitioning for a rehearing has been replaced with the phrase relating to motion to overturn. A clarifying change from proposal was made under paragraph (3) by deleting the term "as appropriate."

Section 116.1050, Multiple Plant Permit Application Fee, is amended to delete language concerning additional public notice costs and language concerning initiation of the public notice by the commission, since the proposal requires the applicant, rather than the commission, to publish notice.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures concerning public notice and hearings, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the rules are major environmental rules, a draft regulatory impact analysis is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of

the agency. This adoption does not exceed a standard set by federal law, and does not exceed an express requirement of state law because it is authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal state agency procedures; as well as the other statutory authorities cited in the STATUTORY AUTHORITY section of this preamble. In addition, the adoption is in direct response to SB 688, and does not exceed the requirements of this bill. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. This adoption does not adopt a rule solely under the general powers of the agency, but rather under specific state laws (i.e., Texas Government Code, §2001.004; and TCAA, §382.05197). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed a preliminary analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for public notice and hearings. As added by SB 688, TCAA, §382.05197: 1) requires an applicant for an MPP filed before September 1, 2001, to publish notice of intent to obtain the permit as required by TCAA, §382.056, with certain exceptions; 2) allows the executive director to authorize an applicant for an MPP for an existing facility that constitutes or is part of a small business stationary source to provide notice using an alternative means if the executive director makes certain findings; 3) requires the executive director to provide an opportunity for a public hearing and the submission of public comment and send notice of a decision on an application for an MPP filed before September 1, 2001, in the same manner as provided under TCAA, §382.0561 and §382.0562; and 4) allows a person affected by a decision of the executive director to issue or deny an MPP filed before September 1, 2001, to move for rehearing and entitles the person to judicial review under TCAA, §382.032. The rules substantially advance these stated purposes by providing specific procedural requirements in response to legislative changes. Promulgation and enforcement of the rules will not burden private real property. The rules 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 governmental action. Consequently, the rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management 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. The rulemaking actions concern only the procedural rules of the commission, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (31 TAC Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 *et seq*.).

PUBLIC COMMENT

A public hearing on the proposal was scheduled to be held in Austin on May 21, 2002. No public comment was offered at the scheduled hearing, so a hearing was not held. Furthermore, no commenters submitted written comments during the comment period which closed at 5:00 p.m., May 28, 2002.

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; TCAA, §382.05192, which requires review and renewal of MPPs to be conducted under §382.055; TCAA, §382.05194, which authorizes the commission to issue MPPs; TCAA, §382.05197, which specifies the notice and hearing procedures for certain MPPs; TCAA, §382.055, which specifies permit review and renewal requirements; and TCAA, §382.056, which specifies notice and hearing requirements for certain air permits.

§116.1011. Multiple Plant Permit Application.

(a) An application for a multiple plant permit (MPP) must include a completed application form. The application form must be signed by an authorized representative of the applicant. The form specifies additional support information which must be provided before the application is deemed complete. In order to be granted an MPP, the owner or operator of the existing facilities shall submit the following information to the executive director:

(1) information to demonstrate compliance with applicable conditions of §116.711 of this title (relating to Flexible Permit Application);

(2) for grandfathered facilities, as defined in §116.10(6) of this title (relating to General Definitions) for which an MPP application is filed prior to September 1, 2001, the information required by §116.811(3) of this title (relating to Voluntary Emission Reduction Permit Application) solely for the purpose of determining the aggregate emission rate of air contaminants to be authorized under the permit;

(3) for permitted facilities, the relevant permit; and

(4) relevant information, indicating that the emissions from the facilities will not contravene the intent of the TCAA, including protection of the public's health and physical property.

(b) Grandfathered facilities which do not apply for an MPP prior to September 1, 2001 must first obtain a permit under Subchapter B of this chapter (relating to New Source Review Permits) before they are eligible to be included in an MPP.

§116.1040. Multiple Plant Permit Public Notice and Public Participation.

(a) An application for a multiple plant permit (MPP) that is filed on or after September 1, 2001, is subject to the same procedural requirements of Chapters 39, 50, 55, and 80 of this title (relating to Public Notice; Action on Applications and Other Authorizations; Requests for Reconsideration and Contested Case Hearings, Public Comment; and Contested Case Hearings) that apply to applications processed under

Subchapter B of this chapter (relating to New Source Review Permits), except that any required newspaper notice shall be published in accordance with subsection (b)(1)(A) of this section.

(b) Applications for MPP initial issuance, amendment, or revocation that are filed before September 1, 2001, are not subject to Texas Government Code, Chapter 2001, and are subject to the notice and hearing process of TCAA, §382.05197, as provided in this subsection.

(1) An applicant for an MPP shall comply with the same public notice requirements that apply to initial issuance of voluntary emission reduction permits and initial issuance of electric generating facility permits as specified in §39.403(d) of this title (relating to Applicability), except as provided by this section.

(A) An applicant for an MPP shall publish notice of intent to obtain the permit as required under §39.603 of this title (relating to Newspaper Notice), except that:

(i) the notice of a proposed MPP for existing facilities shall be published in one or more state-wide or regional newspapers that provide reasonable notice throughout the state; or

(ii) if the MPP for existing facilities will be effective for only part of the state, the notice shall be published in a newspaper of general circulation in the area to be affected.

(B) The notice shall include a statement that the persons identified in paragraph (2) of this subsection are entitled to request a notice and comment hearing from the commission.

(C) The executive director may authorize an applicant for an MPP for an existing facility that constitutes or is part of a small business stationary source as defined in TCAA, §382.0365(h)(2) to provide notice using an alternative means if the executive director finds that the proposed method will result in equal or better communication with the public, considering the effectiveness of the notice in reaching potentially affected persons, the cost, and the consistency with federal requirements.

(2) Any person who may be affected by emissions from a facility that is included in an MPP application under this subsection, or a member of the legislature from the general area in which the facility is located, may request the executive director to hold a notice and comment hearing on the MPP application. The public comment period shall end 30 days after the publication of Notice of Receipt of Application and Intent to Obtain Permit under §39.418 of this title (relating to Notice of Receipt of Application and Intent to Obtain Permit). Any notice and comment hearing request must be made in writing during the 30-day public comment period.

(3) Any hearing for an MPP application under this subsection shall be conducted under the procedures in §116.1041 of this title (relating to Multiple Plant Permit Notice and Comment Hearings).

(4) The executive director's response to public comments and the notice of decision on whether to issue or deny an MPP application under this subsection will be conducted under the procedures in §116.1042 of this title (relating to Notice of Final Action).

(5) A person affected by a decision to issue or deny an MPP application under this subsection may seek review under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), and may seek judicial review under TCAA, §382.032, relating to Appeal of Commission Action.

(c) For applications for renewal of an MPP, any required newspaper notice shall be published in accordance with subsection (b)(1)(A) of this section.

§116.1042. Notice of Final Action.

(a) After the public comment period or the conclusion of any notice and comment hearing, notice will be sent by first class mail of the final action on the application for initial issuance, amendment, or revocation of a multiple plant permit that was filed before September 1, 2001. The notice will include the information required by §39.420(a)(1) - (2) of this title (relating to Transmittal of the Executive Director's Response to Comments and Decision) and will be sent to any person who commented during the public comment period or at the hearing, and to the recipients specified in §39.420(b)(1) - (3) and (5) - (6) of this title.

(b) The notice must include the following:

(1) the response to any comments submitted during the public comment period;

(2) identification of any change in the conditions of the draft permit and the reasons for the change; and

(3) a statement that any person affected by the decision of the executive director may seek review under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision), and may seek judicial review under TCAA, §382.032, Appeal of Commission Action.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Director, Environmental Law Division
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For further information, please call: (512) 239-0348

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CHAPTER 205. GENERAL PERMITS FOR WASTE DISCHARGES

SUBCHAPTER A. GENERAL PERMITS FOR WASTE DISCHARGES

30 TAC §205.2

The Texas Natural Resource Conservation Commission (commission) adopts the amendment to §205.2, Purpose and Applicability, *without change* to the proposed text as published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2957) and it will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The primary purpose of the adopted amendment is to revise the commission rule to conform to certain United States Environmental Protection Agency (EPA) regulations by introducing language which corresponds to the federal regulations.

On September 14, 1998, EPA authorized the State of Texas to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters in the state under the federal Water Pollution Control Act, as amended, 33 United States Code, §§1251

et seq. (commonly referred to as the Clean Water Act or CWA). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, 63 FR 51164 (September 24, 1998), is administered by the commission. The amendment to Chapter 205, necessitated by EPA revisions to its regulations, is part of the commission's effort to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

SECTION DISCUSSION

Section 205.2 is amended to incorporate language contained in 40 Code of Federal Regulations (CFR) §122.28(a)(3). The EPA revised its general permit regulations to clarify that if a water quality-based effluent limit (WQBEL) is derived for a category or subcategory of dischargers, and a general permit is issued for the same category or subcategory of dischargers, then the general permit must contain the same WQBEL.

The EPA believes that there are situations where general permits can effectively impose WQBELs such as where a general permit is developed in close coordination with a total maximum daily load and/or a wasteload allocation. The EPA states that cases (e.g., in Puerto Rico) exist in which general permits are being used to impose WQBELs on facilities within a specific category or subcategory of discharges. Therefore, EPA believes that there are enough situations in which WQBELs are appropriate in general permits for the modification of the rule to be useful. Currently, no general permit in Texas contains numeric WQBELs. In addition, no WQBELs have been established for a specific category or subcategory of dischargers. If a general permit is issued containing WQBELs, the impact on a specific category or subcategory of dischargers will be the same as if the entity chose to obtain an individual permit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in 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 will update the general permits for waste discharge rules to incorporate certain federal regulations regarding NPDES permitting requirements. The amendment does not meet the definition of a "major environmental rule" as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required because the proposed amendment does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission assessed the amendment in accordance with Texas Government Code, 2007.043. The specific purpose of the adopted rulemaking is to ensure that the permit requirements are equivalent to EPA NPDES permitting regulations. The amendment 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 is 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 reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the adopted rule is subject to the CMP and must be consistent with applicable CMP goals and policies in 31 TAC §501.12 and §501.14. The rulemaking will conform commission rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The NPDES requirements incorporated in the commission's rules are consistent with and will aid in achieving CMP goals and policies. The commission also determined that the rulemaking will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

PUBLIC COMMENT

A public hearing was not held on this rulemaking. The public comment period closed May 13, 2002, and no comments were received.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

This agency 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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Stephanie Bergeron
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CHAPTER 281. APPLICATIONS PROCESSING
SUBCHAPTER A. APPLICATIONS PROCESSING

30 TAC §281.25

The Texas Natural Resource Conservation Commission (commission) adopts the amendment to §281.25, Additional Facilities and Projects for Which Texas Pollutant Discharge Elimination System (TPDES) Permits are Required, *without change* to the proposed text as published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 2962) and it will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The adopted amendment incorporates new provisions contained within 40 Code of Federal Regulations (CFR) §§122.30 - 122.37, except for the United States Environmental Protection Agency (EPA) guidance contained in 40 CFR §122.33 and §122.34, to address storm water discharges from small municipal separate storm sewer systems (MS4s). The primary purpose of the amendment is to conform to specified EPA regulations by incorporating the federal regulations by reference.

On September 14, 1998, EPA authorized the State of Texas to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters in the state under the federal Water Pollution Control Act, as amended, 33 United States Code, §§1251 *et seq*. (commonly referred to as the Clean Water Act or CWA). The approved state program, i.e., the TPDES program, 63 FR 51164 (September 24, 1998), is administered by the commission. The amendment to this chapter, necessitated by EPA revisions to its regulations, is part of an effort by the commission to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

SECTION DISCUSSION

The amendment to §281.25 incorporates by reference provisions in 40 CFR §§122.30 - 122.37, except for guidance contained within §122.33 and §122.34. To implement this change, the existing language in §281.25 is designated as subsection (a), and new language incorporating by reference the regulatory requirements of 40 CFR §§122.30 - 122.37 is adopted as subsection (b). The federal rules are Phase II of the storm water program which expand the existing program to include discharges of storm water from smaller governmental entities in areas of less than 100,000 persons. The Phase II rules require small MS4s to establish a storm water discharge control program that meets the requirements of six minimum control measures. The responsibility for implementation may be shared between entities. The MS4 remains responsible for permit compliance if another entity fails to implement a control measure or a portion thereof. These minimum control measures are public education and outreach on storm water impacts, public involvement participation, illicit discharge detection and elimination, construction site storm water runoff control, post- construction storm water management in new development and redevelopment, and pollution prevention/good housekeeping for municipal operations. Implementation of the minimum measures identified for small MS4s should significantly reduce pollutants in urban storm water compared to existing levels in a cost-effective manner.

EPA identified a total of approximately 285 potential MS4s in Texas. Of this total, the EPA identified 229 governmental entities located fully or partially within an "urbanized area" as determined by the Bureau of the Census (at least a population of 50,000 and a density of at least 1,000 people per square mile). However, EPA did not indicate how many of these 229 entities operate MS4s and are therefore subject to permitting regulations. The EPA list did not include military bases, large hospitals, prison complexes, universities, sewer districts, and highway departments that operate a small MS4 within an urbanized area. These entities are also subject to the permitting regulations, but were not individually listed by EPA. The EPA also identified 56 governmental entities located outside of an urbanized area that must be examined by the permitting authority for potential designation (at least a population of 10,000 and a density of at least 1,000 people per square mile). Of the 56 entities identified by the EPA, only those operating a small MS4 would potentially be regulated. The list does not include all operators of small MS4s that may be designated by the commission. Operators of small MS4s in areas with populations below 10,000 and below a density of 1,000 people per square mile may also be designated but examination of them is not required.

A general permit is being prepared by the commission in order to allow entities to apply for permit coverage. Those MS4s choosing not to seek general permit coverage can apply for an individual TPDES permit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The adopted amendment 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 would update application processing rules to incorporate certain federal regulations regarding NPDES permitting requirements. The amendment does not meet the definition of a "major environmental rule" as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required because the proposed amendment does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission assessed the adopted amendment in accordance with Texas Government Code, 2007.043. The specific purpose of the rulemaking is to ensure that permit requirements are equivalent to EPA NPDES permitting regulations. The adopted amendment will substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. The preliminary 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 reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the adopted rule is subject to the CMP and must be consistent with applicable CMP goals and policies in 31 TAC §501.12 and §501.14. The rulemaking will conform commission rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The NPDES requirements incorporated in the commission's rules are consistent with and will aid in achieving CMP goals and policies. The commission also determined that the adopted rulemaking will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

PUBLIC COMMENT

A public hearing was not held on this rulemaking. The public comment period closed May 13, 2002, and no comments were received.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

This agency 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 288. WATER CONSERVATION PLANS, DROUGHT CONTINGENCY PLANS, GUIDELINES AND REQUIREMENTS

SUBCHAPTER A. WATER CONSERVATION PLANS

30 TAC §288.1, §288.4

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §288.1 and §288.4. Section 288.1 is adopted *with change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2965). Section 288.4 is adopted *without change* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 2, 77th Legislature, 2001, made significant changes to the Texas Water Code (TWC). Among those changes was the elimination of irrigation as a type of use for which one could obtain a permit to use state water. In the place of the old irrigation use, SB 2, §§2.01 - 2.03, created the new use category of agricultural use. This new agricultural use category also includes some types of use, such as concentrated animal feeding operations (CAFOs), that in the past would have been permitted under the industrial use category.

The adopted amendments to Chapter 288 update the requirements for water conservation plans to reflect the new use classifications and the new definitions of agriculture and agricultural use from SB 2. No substantive changes in the requirements for water conservation plans are required by the adopted rules. For example, a previously approved water conservation plan for a CAFO is still an acceptable water conservation plan for that agricultural use.

Also as part of this rulemaking implementing portions of SB 2 and House Bill 247, 77th Legislature, 2001, the commission adopts revisions to Chapter 295, Water Rights, Procedural, and Chapter 297, Water Rights, Substantive. The adoption notices for Chapters 295 and 297 are also published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Subchapter A: Water Conservation Plans

Section 288.1, Definitions, is adopted with changes to the proposed text. The adopted amendments add definitions for agriculture or agricultural, agricultural use, and nursery grower. The definitions generally track the definitions established in SB 2 and are necessary for consistency with SB 2. Existing definitions are renumbered accordingly. Additionally, the definition of irrigation use is revised to indicate that irrigation is an agricultural use in accordance with SB 2.

In response to comment on the Chapter 297 proposal stating that the definition of nursery grower in §297.1(34) should be expressly limited to the growing of plants to avoid a potential ambiguity about the potential application of the activities to aquaculture, the commission amended the definition in §297.1(34). The definition has been expressly limited to the activities associated with the growing of plants that the legislature listed in its definition of agriculture to clarify that aquaculture activities are excluded. For consistency, the definition of nursery grower in §288.1 was amended in the same way.

The adopted amendments to §288.4, Water Conservation Plans for Irrigation Use, include changing the section title to Water Conservation Plans for Agricultural Use. The amendments to this section are necessary because SB 2 created a new agricultural use category that included the existing irrigation use and some uses that had been industrial. The existing §288.4(a) only contains requirements for the information that must be provided for individual irrigation users and for systems providing irrigation water to more than one user. The adopted amendments add a new §288.4(a)(1) to provide the requirements for the information that must be provided for individual agricultural users other than irrigation. In the new category of agricultural user, the type of activity that can come under that definition is quite broad. Accordingly, the adopted new §288.4(a)(1) provides very general requirements for all types of agricultural use except irrigation that

must be tailored on a case-by-case basis to the particular type of agricultural activity for which the water is being used. Water conservation plans for irrigation uses remain the same as under the existing rules. Those requirements are now in adopted §288.4(a)(2), due to the renumbering of existing paragraphs (1) and (2). Additionally, the adopted amendments replace the term "irrigation" with the broader term "agricultural" in existing paragraph (2), renumbered as paragraph (3). The adopted amendments also correct an error in subsection (a) by deleting a repeated phrase, "shall provide information." Also in subsection (a), the sentence is reworded by deleting the word "applicable" and adding the phrase "where applicable" for clarification.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a section of the state. These rules relate to changes to the definition of irrigation and agricultural use and require conservation plans for agricultural use as well as irrigation use. These amended rules implement legislation and do not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or public health and safety.

In addition, §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. These rules implement state legislation, do not go beyond that legislation, and do not involve federal law. The commission invited public comment on the draft regulatory impact analysis determination, and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rule amendments under Texas Government Code, §2007.043. The purpose of these amendments is to implement revisions to TWC, Chapter 11. These amendments relate to definitions, and requirements for the types of activities which will come under the definition of "agricultural use." These amendments do not contain any provisions which would have adverse impacts on any property interests. Under TWC, §11.1271, all water users must file a conservation plan when they request a new or amended water right, and all existing water right holders which use over certain amounts of water must file conservation plans. These provisions are already in the statute; therefore, these requirements should not be a further task to these agricultural users. Furthermore, preparing a water conservation plan is not a burden on private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and, therefore, required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the rulemaking for consistency with the CMP goals and policies. The CMP goal applicable to this rulemaking is the goal in 31 TAC §501.12(l) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). The CMP policies applicable to this rulemaking are the policies in 31 TAC §501.14(r), regarding appropriations of water.

The purpose of the adopted rules is to implement portions of SB 2. In accordance with SB 2, certain types of uses that were formally industrial or irrigation uses are now reclassified as agricultural uses. The rules update the requirements for water conservation plans to reflect the new use classifications and the new definitions of agriculture and agricultural use from SB 2. No substantive changes in the requirements for water conservation plans are required by these rules. Therefore, promulgation and enforcement of the adopted rules will not have a direct or significant adverse effect on any CNRAs, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. Therefore, the rulemaking is consistent with the applicable goals and policy. The commission invited public comment on the consistency determination, and no comments were received.

PUBLIC COMMENTS

A public hearing on this proposal was held in Austin on May 9, 2002 at 2:00 p.m., Texas Natural Resource Conservation Commission complex, Building F, Room 2210, 12100 Park 35 Circle. The public comment period closed on May 13, 2002. No oral comments were received at the hearing regarding Chapter 288.

The Lower Colorado River Authority (LCRA) submitted written comments on the proposed revisions to Chapter 288. LCRA generally supported the rules, but suggested changes.

RESPONSE TO COMMENTS

LCRA commented that the proposed rule amendment to §288.1(6) appropriately added qualifying language to the definition of "irrigation" to reflect that only the type of irrigation that qualifies as an "agricultural use" is that type of irrigation that is directly related to "agriculture." LCRA specifically commented that the irrigation of golf courses or parks are types of irrigation that the rules should expressly exclude as an agricultural use. LCRA recommended the addition of an amended definition of "recreational use" that includes all watering of golf courses. LCRA also commented that there should be specific conservation requirements for golf course watering.

The commission has made no change in response to this comment. SB 2 deleted irrigation as a type of use for which state water may be appropriated, stored, or diverted. SB 2 also added agricultural uses as a type of use for which state water may be appropriated, stored, or diverted. Agricultural use was specifically defined in SB 2 as meaning "any use or activity involving agriculture, including irrigation." The commission does not find any language in the statute or any suggestion in the legislative history that the legislature intended agriculture to include some types of use found in the old irrigation use, but exclude from the definition of agriculture some types of activities that under the

prior law were considered irrigation. Further, the commission is unable to find in SB 2 a grant of authority to the commission to allow it to decide that certain types of irrigation use should now be reclassified to other non-agricultural uses. The commission believes that irrigation, now part of the agricultural use category, is meant to be defined as it was defined prior to SB 2.

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.024, as amended by SB 2, §§2.01 - 2.03.

§288.1. Definitions.

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

(1) Agricultural or Agriculture - means any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management; and

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

(2) Agricultural use - Any use or activity involving agriculture, including irrigation.

(3) Conservation - Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(4) Drought contingency plan - A strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies. A drought contingency plan may be a separate document identified as such or may be contained within another water management document(s).

(5) Industrial use - The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, commercial fish production, and the development of power by means other than hydroelectric, but does not include agricultural use.

(6) Irrigation - The agricultural use of water for the irrigation of crops, trees, and pastureland, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(7) Irrigation water use efficiency - The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include, but are not limited to, evapotranspiration needs for vegetative maintenance and growth, salinity management, and leaching requirements associated with irrigation.

(8) Mining use - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(9) Municipal per capita water use - The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(10) Municipal use - The use of potable water within or outside a municipality and its environs whether supplied by a person, privately owned utility, political subdivision, or other entity as well as the use of sewage effluent for certain purposes, including the use of treated water for domestic purposes, fighting fires, sprinkling streets, flushing sewers and drains, watering parks and parkways, and recreational purposes, including public and private swimming pools, the use of potable water in industrial and commercial enterprises supplied by a municipal distribution system without special construction to meet its demands, and for the watering of lawns and family gardens.

(11) Nursery grower - A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease, and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(12) Pollution - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water in the state that renders the water harmful, detrimental, or injurious to humans, animal life, vegetation, or property, or to the public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any lawful or reasonable purpose.

(13) Public Water Supplier - An individual or entity that supplies water to the public for human consumption.

(14) Regional Water Planning Group - A group established by the Texas Water Development Board to prepare a regional water plan under Texas Water Code, §16.053.

(15) Retail Public Water Supplier - An individual or entity that for compensation supplies water to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants when that water is not resold to or used by others.

(16) Reuse - The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state- owned water.

(17) Water conservation plan - A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate document identified as such or may be contained within another water management document(s).

(18) Wholesale Public Water Supplier - An individual or entity that for compensation supplies water to another for resale to the public for human consumption. The term does not include an individual or entity that supplies water to itself or its employees or tenants as an incident of that employee service or tenancy when that water is not resold to or used by others, or an individual or entity that conveys water to another individual or entity, but does not own the right to the water which is conveyed, whether or not for a delivery fee.

This agency 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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Stephanie Bergeron
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CHAPTER 295. WATER RIGHTS, PROCEDURAL

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§295.9, 295.13, 295.31, 295.32, 295.51, 295.71, 295.72, 295.133, and 295.202. Section 295.71 is adopted *with change* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 2998). Sections 295.9, 295.13, 295.31, 295.32, 295.51, 295.72, 295.133, and 295.202 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 2, 77th Legislature, 2001, made significant changes to the Texas Water Code (TWC). Among those changes to surface water law in Texas was the elimination of irrigation as a type of use for which one could obtain a permit to use state water. In the place of the old irrigation use, SB 2, §§2.01 - 2.03, created the new use category of agricultural use. This new agricultural use category includes irrigation use and provides a detailed listing of other activities that are included in the agricultural use category, including floriculture, viticulture, silviculture, horticulture, nursery operations, raising of animals for production of food and fiber, raising equine animals, wildlife management, and planting of cover crops. Some of these types of use, such as raising of animals in concentrated animal feeding operations (CAFOs) or certain types of nursery operations, could have been permitted under the industrial use category prior to September 1, 2001. Most of the adopted amendments to Chapter 295 relate to implementation of this change from irrigation use to agricultural use and providing for the transition.

Other provisions of SB 2 implemented by this rulemaking include amendments to TWC, §11.146 and §11.177, related to forfeiture and cancellation of water rights. SB 2 also exempted certain water right applications from the one-time use fee at the time of the applications. These provisions are implemented in this adopted rulemaking.

Also as part of this rulemaking implementing House Bill 247, 77th Legislature, 2001, and portions of SB 2, the commission adopts revisions to 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements, and 30 TAC Chapter 297, Water Rights, Substantive. The adoption notices for Chapters 288 and 297 are also published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Subchapter A: Requirements of Water Rights Applications General Provisions

Division 1: General Requirements

The adopted amendments to §295.9, Water Conservation and Drought Contingency Plans, revise the term "irrigation use" to "agricultural use" to implement the new agricultural use category that expanded the existing irrigation use to include other types of agricultural activities.

The adopted amendment to §295.13, Interbasin Transfers, corrects the section title in a reference to §297.52. The title of §297.52 is adopted to become Suppliers of Water for Agriculture.

Division 3: Additional Requirements for Agriculture

The title of Division 3 is changed to Additional Requirements for Agriculture to reflect the revisions adopted in the division.

The adopted amendment to §295.31, Ownership Information Required; Exceptions, changes the phrase "irrigation of" to "agricultural use on" to reflect the new agricultural use category created by SB 2.

The adopted amendment to §295.32, Documents and Information To Be Submitted, revises the term "irrigation" to "agricultural use" to reflect the new agricultural use category created by SB 2.

Division 5: Requirements for Applications for Permits Under Texas Water Code, §11.143

The adopted amendment to §295.51, Application for Texas Water Code, §11.143, Permit, rewords subsection (a)(9) to clarify that the information required in paragraph (9) is required only for applicants who intend to use water to irrigate under the new agricultural use category.

Division 7: Requirements for Applications for Amendments to Water Use Permits and Extensions of Time

The adopted amendment to §295.71, Applications To Amend a Permit, tracks new language in TWC, §11.122. That language is placed in the rules to clarify that existing water right holders of industrial or irrigation permits are not required to seek an amendment to their permit if their actual use would be classified as an agricultural use. Holders of existing certified filings or certificates of adjudication that were classified as industrial or irrigation before September 1, 2001, but would now be classified as agricultural may choose to file an application for an amendment to change the use to an agricultural use. Such applications are considered by the commission as minor amendments not requiring notice.

The commission received a comment on Chapter 297 stating that the proposed rule language in §297.61(c) could be interpreted to authorize an industrial use permit to include any irrigation activity even if the industrial use permit had never contemplated any type of irrigation use. The proposed language in

§295.71 was identical to the language being commented on in Chapter 297. The commission determined that proposed language in §297.61(c) was not necessary since that section only applies to amendments initiated by the executive director; therefore, proposed subsection (c) was not adopted. However, the commission agrees that the proposed language might be misinterpreted by some as authorizing any industrial use permit to now use that permit for agricultural uses. That is not the commission's understanding of the legislative intent. Therefore, the commission clarified §295.71 by stating that the holder of a permit, certified filing, or certificate of adjudication issued before September 1, 2001, for industrial use or irrigation use where the actual use of the water is now classified as agricultural use may continue to use or supply water in accordance with the previously issued permit, certified filing, or certificate of adjudication without obtaining an amendment.

The adopted amendments to §295.72, Applications for Extensions of Time, clarify commission intent and provide an additional cross-reference. In subsections (a) and (b), the term "due diligence" is replaced with "reasonable diligence" to follow the wording of TWC, §11.146 and §11.177, in order to clarify that the commission does not intend to set a different standard for cancellation of water rights for failure to begin or complete construction than is expressed in TWC, §11.177 for cancellation of a water right. The adopted amendment to subsection (c) adds an additional reference to the substantive rules related to forfeiture of water rights so as to avoid repeating new limitations of forfeiture that are adopted in §297.74.

Subchapter B: Water Use Permit Fees

The amendments to §295.133, One-Time Use Fees, include changes to clarify that all of the fees listed in the section must be submitted at the time an application is filed, even if those fees can be considered use fees. The adopted amendments also include changing the one-time irrigation use fee to a one-time agricultural use fee to reflect the new agricultural use created by SB 2. The adopted amendments also add a waiver of the one-time use fee for applications for instream use water rights to be deposited into the Texas Water Trust. The amendment is necessary to implement the waiver in TWC, §5.235(j).

Subchapter F: Miscellaneous

The adopted amendments to §295.202, Reports, correct an obsolete reference.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a section of the state. The rule amendments in Chapter 295 are procedural in nature, relating to filing applications and procedural requirements for certain actions, and do not adversely affect the economy, productivity, competition, jobs, the environment, or public health and safety.

In addition, §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. These amendments are necessary to implement state law, do not exceed any requirements of that law, and do not involve federal law. The commission invited public comment on the draft regulatory impact analysis determination, and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rule amendments under Texas Government Code, §2007.043. The purpose of these amendments is to implement procedural amendments made by SB 2 in TWC, Chapter 11. These amendments relate to changing and adding to the definition of irrigation and agriculture and making changes to procedural rules for cancellation of water rights. These amendments do not adversely affect private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it was a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and, therefore, required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the rulemaking for consistency with the CMP goals and policies. The CMP goal applicable to this rulemaking is the goal in 31 TAC §501.12(l) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). The CMP policies applicable to this rulemaking are the policies in 31 TAC §501.14(r), regarding appropriations of water.

The purpose of the adopted rules is to implement portions of SB 2. More specifically, the rules include changes and additions to the definition of irrigation and agriculture and changes to procedural rules for cancellation of water rights. Promulgation and enforcement of the adopted rules will not have a direct or significant adverse effect on any CNRAs, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. No new uses for water rights are authorized by these amendments. In accordance with SB 2, certain types of uses that were formally industrial or irrigation uses are now reclassified as agricultural uses. Therefore, the rulemaking is consistent with the applicable goals and policy. The commission invited public comment on the consistency determination, and no comments were received.

PUBLIC COMMENTS

A public hearing on this proposal was held in Austin on May 9, 2002 at 2:00 p.m., Texas Natural Resource Conservation Commission complex, Building F, Room 2210, 12100 Park 35 Circle. The public comment period closed on May 13, 2002. No oral comments were received at the hearing regarding Chapter 295.

The Lower Colorado River Authority (LCRA) submitted written comments on the proposed revisions to Chapter 295. LCRA generally supported the rules, but suggested changes.

RESPONSE TO COMMENTS

LCRA commented that it is not a reasonable interpretation of SB 2 to include the use of water to maintain a golf course or a park as an agricultural use. Instead, the LCRA commented that use of water to maintain golf courses or parks should be considered a "recreational use" of the water. LCRA went on to recommend the addition of a specific requirement in §295.9 that applications to appropriate or use state water for purposes of golf courses submit a water conservation plan in accordance with the requirements of Chapter 288.

The commission has made no change in response to this comment. SB 2 deleted irrigation as a type of use for which state water may be appropriated, stored, or diverted. SB 2 also added agricultural uses as a type of use for which state water may be appropriated, stored, or diverted. "Agricultural use" was specifically defined in SB 2 as meaning "any use or activity involving agriculture, including irrigation." The commission does not find any language in the statute or any suggestion in the legislative history that the legislature intended agriculture to include some types of use found in the old irrigation use, but exclude from the definition of agriculture some types of activities that under the prior law were considered irrigation. Further, the commission is unable to find in SB 2 a grant of authority to the commission to allow it to decide that certain types of irrigation use should now be reclassified to other non-agricultural uses. The commission believes that irrigation, now part of the agricultural use category, is meant to be defined as it was defined prior to SB 2. The commission notes that, under the adopted rules, applications to appropriate water for an agricultural use that will in fact be used to irrigate a golf course or park will be required to submit a water conservation plan under §295.9. The commission believes that it would be redundant to single out golf courses or parks for specific mention as requiring a water conservation plan.

SUBCHAPTER A. REQUIREMENTS OF WATER RIGHTS APPLICATIONS GENERAL PROVISIONS

DIVISION 1. GENERAL REQUIREMENTS

30 TAC §295.9, §295.13

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§5.235(j), 11.002, 11.023, 11.024, 11.085, 11.122, 11.146, and 11.177, as amended by SB 2, §§2.01 - 2.03, 2.05, 2.07, 2.10, 2.13, and 4.03.

This agency 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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Stephanie Bergeron

Division Director, Environmental Law Division

Texas Natural Resource Conservation Commission

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For further information, please call: (512) 239-5017

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DIVISION 3. ADDITIONAL REQUIREMENTS FOR AGRICULTURE

30 TAC §295.31, §295.32

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§5.235(j), 11.002, 11.023, 11.024, 11.085, 11.122, 11.146, and 11.177, as amended by SB 2, §§2.01 - 2.03, 2.05, 2.07, 2.10, 2.13, and 4.03.

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DIVISION 5. REQUIREMENTS FOR APPLICATIONS FOR PERMITS UNDER TEXAS WATER CODE, §11.143

30 TAC §295.51

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§5.235(j), 11.002, 11.023, 11.024, 11.085, 11.122, 11.146, and 11.177, as amended by SB 2, §§2.01 - 2.03, 2.05, 2.07, 2.10, 2.13, and 4.03.

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DIVISION 7. REQUIREMENTS FOR APPLICATIONS FOR AMENDMENTS TO WATER USE PERMITS AND EXTENSIONS OF TIME

30 TAC §295.71, §295.72

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§5.235(j), 11.002, 11.023, 11.024, 11.085, 11.122, 11.146, and 11.177, as amended by SB 2, §§2.01 - 2.03, 2.05, 2.07, 2.10, 2.13, and 4.03.

§295.71. Applications To Amend a Permit.

An applicant for an amendment to a water use permit or certificate of adjudication shall file an application prepared in the manner of an original application for a permit. However, the title of the application should be altered to reflect the fact that it is a request for an amendment. A proposed amendment, including an amendment on the motion of the executive director, shall be recorded in the same manner as a permit application. The holder of a permit, certified filing, or certificate of adjudication issued before September 1, 2001, for industrial use or irrigation use where the actual use of the water is now classified as agricultural use may continue to use or supply water in accordance with the previously issued permit, certified filing, or certificate of adjudication without obtaining an 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.

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SUBCHAPTER B. WATER USE PERMIT FEES

30 TAC §295.133

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§5.235(j), 11.002, 11.023, 11.024, 11.085, 11.122, 11.146, and 11.177, as amended by SB 2, §§2.01 - 2.03, 2.05, 2.07, 2.10, 2.13, and 4.03.

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SUBCHAPTER F. MISCELLANEOUS

30 TAC §295.202

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§5.235(j), 11.002, 11.023, 11.024, 11.085, 11.122, 11.146, and 11.177, as amended by SB 2, §§2.01 - 2.03, 2.05, 2.07, 2.10, 2.13, and 4.03.

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CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §§297.1, 297.15, 297.18, 297.21, 297.41 - 297.43, 297.51, 297.52, 297.61, 297.71, 297.73, 297.74, and 297.104. Sections 297.1, 297.21, 297.51, 297.61, and 297.71 are adopted *with changes* to the proposed text as published in the April 12, 2002 issue of the *Texas Register* (27 TexReg 3004). Sections 297.15, 297.18, 297.41 - 297.43, 297.52, 297.73, 297.74, and 297.104 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 2, 77th Legislature, 2001, made significant changes to the Texas Water Code (TWC). Among those changes to surface water law in Texas was the elimination of "irrigation" as a type of use for which one could obtain a permit

to use state water. In the place of the old irrigation use, SB 2, §§2.01 - 2.03, created the new category of agricultural use. This new agricultural use category included irrigation use and provided a detailed listing of other activities that are included in the agricultural use category, including floriculture, viticulture, silviculture, horticulture, nursery operations, raising of animals for production of food and fiber, raising equine animals, wildlife management, and planting of cover crops. Some of these types of use, such as raising of animals in concentrated animal feeding operations (CAFOs) or certain types of nursery operations, could have been permitted under the industrial use category prior to September 1, 2001.

Many of the adopted amendments to Chapter 297 relate to implementation of this change from irrigation use to agricultural use and providing for a transition. Other provisions of SB 2 implemented by the adopted rules include amendments to TWC, §§11.146, 11.173, and 11.177, related to forfeiture and cancellation of water rights. Also adopted are rules to implement SB 2, §2.15, that relate to a requirement that persons who do not timely complete and return groundwater or surface water surveys conducted by the Texas Water Development Board (TWDB) are ineligible to obtain permits, permit amendments, or permit renewals from the commission under TWC, Chapter 11, Water Rights.

Amendments adopted in this rulemaking also include amendments designed to implement the new surface water permit exemption for certain reservoirs used for fish and wildlife management purposes enacted by House Bill (HB) 247 and SB 2, §2.09. These bills also made changes to the domestic and livestock exemption that are also implemented by this rulemaking. This rulemaking also proposes clarification of provisions of some rules.

Section references in this preamble are generally to the section of the codified version of the TWC as amended by SB 2 and are not generally references to the statute-at-large unless the context clearly indicates otherwise.

Also as part of this rulemaking implementing HB 247 and portions of SB 2, the commission adopts revisions to 30 TAC Chapter 288, Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements, and 30 TAC Chapter 295, Water Rights, Procedural. The adoption notices for Chapters 288 and 295 are also published in this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

Subchapter A: Definitions

The amendments to §297.1, Definitions, are adopted with changes to the proposed text. The amended section provides definitions for new words required by SB 2, or in some cases, amends old definitions to comply with the requirements of SB 2. Definitions were added for agriculture or agricultural, agricultural use, nursery grower, and river basin. The definition of agriculture generally tracks the definition found in TWC, §11.002. The word "Agriculture" was added to the definitions to clearly indicate that "agricultural use" in §297.1(2) includes all activities listed in the definition of agriculture in §297.1(1).

The definition of "Baseflow or normal flow" in adopted §297.1(6) was amended to substitute the agricultural use created by SB 2 for the older term "irrigation use." The term "industrial use" has been amended in adopted §297.1(24), to remove commercial feedlot operations which were an industrial use, but now are included within agricultural uses in accordance with SB 2. In adopted §297.1(26), the term "Irrigation use" is revised to "Irrigation," and in adopted §297.1(27), the term "Irrigation water use efficiency" is revised to "Irrigation water efficiency." These changes were made since irrigation is no longer a use category due to the changes made by SB 2. In adopted §297.1(34), the definition of "Nursery grower" generally tracks the definition of SB 2. However, in response to comment, the definition has been expressly limited to the activities associated with the growing of plants that the legislature listed in its definition of agriculture to clarify that aquaculture activities are excluded. In adopted §297.1(39), the definition of "Reclaimed water" is revised to change the term "irrigation" to "agricultural" in accordance with SB 2. In adopted §297.1(45), the definition of "River basin" tracks the new definition in TWC, §11.002(11), and was necessary to implement the statute. The other definitions are renumbered to accommodate the additional definitions. Other minor grammatical corrections were made throughout the section, including changes since proposal to spell out Texas Water Code within each definition.

Subchapter B: Classes of Water Rights

The adopted amendments to §297.15, Permit for Additional Uses from a Domestic and Livestock Reservoir, Texas Water Code, §11.143, include revising the section title to Permit for Use of Water from Exempt Dam or Reservoir for Nonexempt Purposes, Texas Water Code, §11.143, to reflect the new title of TWC, §11.143, as amended by HB 247. The adopted amendments also include changes to incorporate dams or reservoirs exempt for wildlife management purposes. This revision was necessary to implement amendments to TWC, §11.143.

The adopted amendments to §297.18, Interbasin Transfers, Texas Water Code, §11.085, delete language from the rule that provided that basins are designated as provided by TWC, §16.051. The amendment was necessary to implement changes to TWC, §11.085(p). The rule that river basins are designated by the TWDB as provided by TWC, §16.051, is retained in the rules under the adopted definition of river basin, in accordance with the definition of river basin in TWC, §11.002.

Subchapter C: Use Exempt From Permitting

The amendments to §297.21, Domestic and Livestock Use, are adopted with changes to the proposed text. The amendments were necessary to implement HB 247 and SB 2, §2.09. The section title becomes Domestic and Livestock and Wildlife Permit Exemptions. Subsection (b) clarifies that use of land for livestock purposes does not defeat the domestic and livestock exemption, but other commercial operations will require a permit. Language added to adopted subsection (b) in response to comment clarifies that a person may temporarily store more than 200 acre-feet in a larger capacity exempt domestic and livestock reservoir, as long as the person does not average more than 200 acre- feet in a 12-month period. The rule specifies that the choice of the 12-month period is at the owner's discretion, but the owner must be consistent from year-to-year in the choice of the 12 months to be averaged. In response to comment, the adopted rule was revised to add details regarding the type of records required. The adopted rule specifies that the owner must also keep records to demonstrate his or her compliance. The owner must keep reservoir water level records that are taken at least once a month. In addition the owner must be able to produce reservoir capacity data that shows the volume of water in acre-feet for a given water level of the reservoir. This reservoir capacity data which relates the water level to the volume of water in acre-feet may be available from the original plans and specifications for the dam. The United States Department of Agriculture Natural Resources Conservation Service, formerly the Soil Conservation Service,

may have records or information to produce this data. The owner may also decide to have a consulting engineer produce this information. The reservoir capacity data need not be updated. Also in response to comment, the adopted rule was revised to clarify that it is the owner's responsibility to maintain the monthly reservoir water level records and obtain the reservoir capacity data for inspection by the executive director, if requested. The records and other data need not be turned over to the executive director on a routine basis or absent a request.

Adopted subsection (e) adds a new exemption for wildlife management and fish management purposes. The dam or reservoir must be located on property that qualifies as open-space land under Texas Tax Code (TTC), §23.51. Commercial operations were given a specific definition in proposed subsection (e) to harmonize the provisions of HB 247 and the related provisions of SB 2 and to indicate that only certain commercial operations were intended to be excluded. The exemption is not available for commercial operations, which was defined at proposal as the use of land for industrial parks and housing developments. However, to further clarify the definition and partially in response to comment, the adopted rule was revised to define commercial operation as the use of land for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. But if the land remains qualified open-space under the TTC, then the incidental use of the land for commercial purposes does not defeat the exemption.

Subchapter E: Issuance and Conditions of Water Rights

The adopted amendments to §297.41, General Approval Criteria, delete obsolete language and revise §297.41(a)(3)(D) to add references to specific assessments that must be performed under the TWC. The adopted changes to §297.41(a)(3)(E) clarify that an application must be consistent with the relevant approved regional water plan. These adopted amendments were necessary to implement TWC, §11.134, which requires consistency with approved regional water plans. The adopted §297.41(a)(5) adds a new requirement that the applicant must have completed and returned all required TWDB surveys of groundwater and surface water use. Surveys prior to September 1, 2001 need not be completed by the applicant for the commission to consider the application. However, the adopted amendments would require the applicant to have completed all other TWDB water surveys required by the TWDB of the applicant since that time in order for the water right application, including applicants for amendments to existing water rights, to be considered by the commission. If the application was for a new entity that had never used groundwater or surface water or never had the type of use that would trigger a TWDB water survey, then the requirement does not apply. These amendments were necessary to implement TWC, §16.012, which added these survey requirements for a person to apply for a water right.

The adopted amendments to §297.42, Water Availability, add an additional reference in subsection (b) to clarify that the commission will be considering the results of instream flow studies in its review of any management plan, water right, or interbasin transfer. This amendment was necessary to implement TWC, §16.059, which added this requirement. In addition, subsection (c) is amended to clarify that the criteria to have 75% of the water requested available 75% of the time (75/75 criteria) at the source of supply continues to apply to applications for direct diversion without storage for irrigation. However, the word "use" was deleted since the use category is no longer irrigation, but is now agricultural. For those new types of agricultural activities other than irrigation, the applicant must meet the general criteria that there is a sufficient amount of unappropriated water available for a sufficient amount of the time to make the adopted project viable, and ensure the beneficial use of water without waste. That determination will be made on a case-by-case basis. This amendment was necessary to clarify the application of the 75/75 criteria now that irrigation is an activity included with other agricultural activities under TWC, §11.002 and §11.023.

The adopted amendments to §297.43, Beneficial Uses, add agriculture as a type of use for which state water may be appropriated, stored, or diverted and delete irrigation and stock raising as uses because those activities are now included in the agricultural use category. Other paragraphs are renumbered accordingly. The commission is not implying any order or preference of use by the order of listing uses in this section. These amendments were necessary to implement TWC, §11.023.

The amendment to §297.51, Time Limitations for Commencement or Completion of Construction, is adopted with changes to the proposed text to add the phrase "of this title," which is required after a section reference. The adopted section clarifies that the time limit for construction of a storage reservoir is subject to not only the notice and hearing requirements of §295.72, Applications for Extensions of Time, but also to the exceptions of §297.74, Forfeiture and Revocation of Water Right. The adopted amendment was necessary to implement TWC, §11.146, which added that exemption.

The adopted amendments to §297.52, Supplier of Water for Irrigation, revise the section title to Suppliers of Water for Agriculture, and replace the term "irrigation" with the term "agriculture." The adopted amendments were necessary to implement the new agricultural use under TWC, §11.023.

Subchapter F: Amendments to Water Rights; Corrections to Water Rights

The proposed amendment to §297.61, Amendments by Executive Director, is not adopted because this revision is unnecessary since this section only applies to amendments initiated by the executive director.

Subchapter G: Cancellation, Revocation, Abandonment, and Forfeiture of Water Rights

The amendments to §297.71, Cancellation in Whole or in Part, are adopted with changes to the proposed text in order to use the acronym "TWC" for Texas Water Code. The adopted amendments include the addition of qualifiers to the exemption from cancellation for water rights used in accordance with the approved regional water plan. The adopted amendments also add new exemptions from cancellation for long- term public water or electrical generation supplies consistent with the state water plan and for reservoirs funded as part of the holder's long-term water planning. These exemptions were factors to consider in cancellation procedures in §297.73, but were deleted in that section. The amendments were necessary to implement TWC, §11.173.

The adopted amendments to §297.73, Commission Finding; Action, revise the term "due diligence" to "reasonable diligence" in subsection (b) to follow the wording of TWC, §11.146 and §11.177, and to clarify that the commission does not intend to set a different standard for cancellation of water rights for failure to begin construction than its expressed legislative authorization for cancellation of water rights in §11.177. Paragraphs (3) and (4) are moved to §297.71 in order to implement TWC, §11.173

and §11.177, which made these factors exemptions from cancellation. Other adopted amendments make clerical corrections and renumber the paragraphs.

The adopted amendment to §297.74, Forfeiture and Revocation of Water Right, adds a new exemption from forfeiture for reservoirs of more than 50,000 acre-feet of water. The amendment was necessary to implement TWC, §11.146.

Subchapter J: Water Supply Contracts and Amendments

The adopted amendment to §297.104, Special Requirements for Upstream Sales of Water from Storage, deletes the words "term or temporary" from the requirement that a supplier or purchaser obtain a permit or amendment when the purchaser of water obtains a contract to divert water upstream of a supplier's storage reservoir in a manner that impairs the supplier's water right. This change was necessary to clarify that the type of permit to be obtained is not a temporary or term permit as defined in TWC, Chapter 11.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a section of the state. These amended rules implement legislation and do not adversely affect in a material way the economy, productivity, competition, jobs, the environment, or public health and safety. These rules relate to changes to the definition of irrigation and agricultural use, minor changes to the cancellation statutes, and changes to the exemption from permitting for impounding water on one's own property for domestic and livestock use. The exemption is expanded to cover wildlife management and property which is exempt from taxation under the agriculture, or open space, exemption. These changes, if anything, could have a positive effect on the economy.

In addition, §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. These rules implement state legislation, do not go beyond that legislation, and do not involve federal law. The commission invited public comment on the draft regulatory impact analysis determination, and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for the rule amendments under Texas Government Code, §2007.043. The purpose of these amendments is to implement amendments to TWC, Chapter 11. These amendments relate to definitions, cancellation of a water right, and the domestic and livestock reservoir exemption from permitting and do not contain any provisions which would have adverse impacts on any property interests. The cancellation provisions simply change a factor for determining cancellation to an exemption. The domestic and livestock reservoir changes provide that more types of uses of this impounded water may be exempt from permitting. Thus, there is no burden to private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it was a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, or will affect an action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and, therefore, required that applicable goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. In accordance with the regulations of the Coastal Coordination Council, the commission reviewed the rulemaking for consistency with the CMP goals and policies. The CMP goal applicable to this rulemaking is the goal in 31 TAC §501.12(l) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs). The CMP policies applicable to this rulemaking are the policies in 31 TAC §501.14(r), regarding appropriations of water.

The purpose of the adopted rules is to implement HB 247 and portions of SB 2. More specifically, the adopted rules include changes to the definition of irrigation and agricultural use, minor changes to the cancellation statutes, changes to the exemption from permitting for impounding water on one's own property for domestic and livestock use, and the expansion of the permit exemption to cover wildlife management and property which is exempt from taxation under the agriculture, or open space, exemption. Promulgation and enforcement of the adopted rules will not have a direct or significant adverse effect on any CNRAs, nor will the rulemaking have a substantive effect on commission actions subject to the CMP. No new uses for water rights are authorized by these amendments. In accordance with SB 2, certain types of uses that were formally industrial or irrigation uses are now reclassified as agricultural uses. The creation of a permit exemption for wildlife management purposes is anticipated to have a positive effect on enhancing the diversity of CNRAs by facilitating the creation of small wetlands. Therefore, the rulemaking is consistent with the applicable goals and policy. The commission invited public comment on the consistency determination, and no comments were received.

PUBLIC COMMENTS

A public hearing on this proposal was held in Austin on May 9, 2002 at 2:00 p.m., Texas Natural Resource Conservation Commission complex, Building F, Room 2210, 12100 Park 35 Circle. The public comment period closed on May 13, 2002. James Kowis Consulting (Kowis) submitted oral comments at the hearing. Kowis, the Lower Colorado River Authority (LCRA), the National Wildlife Federation (NWF), and the Texas Prairie Wetlands Project (TPWP) submitted written comments on the proposed revisions to Chapter 297. TPWP expressed support for the proposed rules, and LCRA, NWF, and Kowis generally supported the rules, but suggested changes.

RESPONSE TO COMMENTS

LCRA commented that the definition of irrigation in §297.1(26) should be limited to only that type of irrigation that is directly related to "agriculture" as that term is defined in SB 2. LCRA

specifically mentioned the irrigation of golf courses or parks as the type of irrigation that it felt the rules should expressly exclude as an agricultural use.

The commission made no changes to the rule in response to this comment. SB 2 deleted irrigation as a type of use for which state water may be appropriated, stored, or diverted. SB 2 also added agricultural uses as a type of use for which state water may be appropriated, stored, or diverted. "Agricultural use" was specifically defined in SB 2 as meaning "any use or activity involving agriculture, including irrigation." The commission does not find any language in the statute or any suggestion in the legislative history that the legislature intended agriculture use to include some types of use under the old irrigation use category, but move other types of irrigation use to some other category. Further, the commission is unable to find in SB 2 a grant of authority to the commission to allow it to decide that certain types of irrigation use should now be reclassified to other non-agricultural uses.

NWF commented that the definition of nursery grower in §297.1(34) should be expressly limited to the growing of plants to avoid a potential ambiguity about the potential application of the activities to aquaculture.

The commission agrees that nursery growers were intended to be limited to growers of plants. Aquaculture activities were not included in the detailed listing of activities included by the legislature in its definition of agriculture. Accordingly, §297.1(34) has been clarified by limiting nursery growers to those operations involved in the cultivation of plant activities listed by the legislature in its definition of agriculture.

LCRA commented that the definition of recreational use in the proposed new §297.1(40) should include use of water to maintain golf courses and parks.

The commission has made no change in response to this comment. The commission reads the agricultural use definition in SB 2 of "any use or activity involving agriculture, including irrigation," as expressing a legislative intent to expand the old irrigation use to include additional uses rather than move some irrigation uses to the new agricultural use category and move other types of irrigation uses to other existing types of use for which state water could be appropriated, stored, or diverted.

TPWP expressed support and the group's strong endorsement of §297.21 as proposed.

The commission appreciates the support.

Kowis commented that §297.21(b) should be clarified in several aspects. First, he suggested that the section be clarified that a person could temporarily store more than 200 acre-feet of water in a reservoir that has a normal storage capacity of greater than 200 acre-feet. Kowis felt that the proposed language could be interpreted that only a reservoir with a normal capacity of 200 acre-feet or less would qualify under the rule. Second, Kowis suggested that the rule be clarified to state that water level information is the information required to be maintained by the owner. Finally, Kowis commented that the rule should be clarified that the records be required to be maintained by the owner and not routinely submitted to the commission.

The commission notes that the proposed rule tracked the language of the statute. However, the commission agrees that the intent of the statute was to allow a person to temporarily store more than 200 acre-feet in a larger capacity reservoir without obtaining a permit if the person otherwise complies with provisions of the exemption. Therefore, the commission revised the rule accordingly. In response to the comment regarding the required records, the commission clarified what records must be kept to document that the reservoir has not stored more than 200 acre-feet during a 12-month period. The commission notes that reservoir water level data alone is insufficient to determine the volume of water in acre-feet at any one time or for a 12-month average. The reservoir water level information must be coupled with reservoir capacity data that relates the volume of storage in acre-feet in the reservoir given the reservoir water level. This reservoir capacity data may be available from the original plans and specifications for the dam, or the Natural Resources Conservation Service, formerly the Soil Conservation Service, may have records or information to produce this data, or the owner may decide to have a consulting engineer produce the data. Accordingly, the commission revised the rule to specify the data that must be collected by the owner. The adopted rule specifies that the reservoir water level records must be kept on a monthly basis so that a monthly average can be calculated, if necessary, to demonstrate compliance with the 12-month average requirement. There is no requirement to update the reservoir capacity data. The commission agrees that the records should be maintained by the owner, so that they are available for inspection by the executive director, if necessary. Accordingly, the commission revised the rule to clarify that the records must be maintained by the owner.

NWF commented that §297.21(e) should be clarified in several aspects. First, NWF commented that the phrase "does not apply to a commercial operation" could be read as only disqualifying direct use of the impoundment in a commercial operation. NWF suggested changing the provision to: "This exemption does not apply to property used in connection with a commercial operation."

The commission has made no change in response to this comment. In harmonizing HB 247 and the related provisions of SB 2, the commission understands the legislative intent to allow this wildlife management exempt reservoir on land used for agricultural operations, but that the legislature did not intend for the exemption to be available to a narrow class of commercial operations. Use of the suggested phrase could be interpreted as not allowing the exemption for activities that are incidental to traditional family farms and ranches that are trying to expand their economic base. The commission believes these family farms are intended to be covered by the exemption.

NWF commented that the word "and" should be changed to "or" in the phrase "the use of land for industrial parks and housing developments" in §297.21(e) because either use should be excluded.

The commission agrees that the legislature intended that either use be excluded from the opportunity for this exemption. Therefore, this change has been made to the adopted rule.

NWF commented that the scope of the commercial operation provision in §297.21(e) was vague because the terms "industrial park" and "housing developments" are undefined. NWF suggested that an industrial facility that was housed in a single building and an apartment complex are examples of types of operations that were not intended to have the benefit of the exemption, yet might not be clearly excluded by the language of the proposed rule. NWF suggested adding the phase "or similar types of operations" to the reference to commercial operations.

The commission revised the rule in response to this comment. The commission understands the legislative intent to exclude industrial facilities whether they are in a stand-alone facility or an industrial park. Therefore, the adopted rule has been modified to reflect this clarification. The commission believes that use of the land for a housing development was intended to disqualify the land for the wildlife exemption, but that the addition of apartment complexes to the list is unnecessary because the commission notes that in order to qualify for the exemption under the adopted rule, the land must be qualified open-space land as defined in TTC, §23.51. The commission declined to use the suggested phrase "or similar types of operations," because the commission is concerned that the phrase could be interpreted not to allow the exemption for activities that are incidental to traditional family farms and ranches that are trying to expand their economic base which were clearly intended to be covered by the exemption.

NWF commented that the last sentence of §297.21(e) should be clarified by adding a "commercial operations" qualifier so that the sentence could not be read as an exception to the earlier commercial operations language. NWF stated that the qualifier would still allow other incidental commercial activities.

The commission made no changes to the rule in response to the comment. The commission does not read the sentence in the adopted rule as an exception to the earlier commercial operations language. To qualify for the permit exemption under the adopted rule, the land must be on qualified open-space land as defined in TTC, §23.51, and it cannot be used for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. However, incidental use of the property in a manner that does not take the land out of the qualified open-space definition is permissible even if the incidental use of the land is for a commercial operation as defined in adopted §297.21(e).

NWF commented that §297.61(c) is overly broad. NWF felt that the proposed rule language could be interpreted to authorize an industrial use permit to include any irrigation activity even if the industrial use permit had never contemplated any type of irrigation use.

The commission determined that proposed language in §297.61(c) is not necessary since the section only applies to amendments initiated by the executive director; therefore, proposed subsection (c) is not adopted. However, the same language was correctly proposed to be added to §295.71, Applications To Amend a Permit, and the commission agrees that the language in the proposed rule might be misinterpreted by some as authorizing any industrial use permit to now use that permit for agricultural uses. That is not the commission's understanding of the legislative intent; therefore, the commission revised §295.71 accordingly. Under adopted §295.71 , holders of water rights issued as irrigation water rights before September 1, 2001 do not have to obtain an amendment to be able to continue to use that water right for the same purposes, which is now classified as an agricultural water right. Also under the adopted rule, holders of water rights issues before September 1, 2001 for industrial uses, where the water was actually used for activities such as CAFOs that are now classified as agricultural uses, do not have to obtain an amendment to continue to use that water right for the same purpose.

SUBCHAPTER A. DEFINITIONS

30 TAC §297.1

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation and Drought Contingency Plans and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agriculture or agricultural - means any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management; and

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure.

(2) Agricultural use - Any use or activity involving agriculture, including irrigation.

(3) Appropriations - The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(4) Appropriative right - The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) Aquifer Storage and Retrieval Project - A project with two phases that anticipates the use of a Class V aquifer storage well, as defined in §331.2 of this title (relating to Definitions), for injection into a geologic formation, group of formations, or part of a formation that is capable of underground storage of appropriated surface water for subsequent retrieval and beneficial use. Phase I of the project requires commission authorization by a temporary or term permit to determine feasibility for ultimate storage and retrieval for beneficial use. Phase II of the project requires commission authorization by permit or permit amendment after the commission has determined that Phase I of the project has been successful.

(6) Baseflow or normal flow - The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)

(7) Beneficial inflows - Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain

an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(8) Beneficial use - Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(9) Certificate of adjudication - An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of Texas Water Code, §11.323, or the final judgment and decree in *State of Texas v. Hidalgo County Water Control and Improvement District No. 18*, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(10) Certified filing - A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(11) Claim - A sworn statement filed under Texas Water Code, §11.303.

(12) Commencement of construction - An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(13) Conservation - Those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(14) Conserved water - That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques, or technologies.

(15) Dam - Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(16) Diffused surface water - Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(17) District - Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(18) Domestic use - Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(19) Drought of record - The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(20) Firm yield - That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(21) Groundwater - Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(22) Habitat Mitigation - Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(23) Hydropower use - The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(24) Industrial use - The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including commercial fish and shellfish production and the development of power by means other than hydroelectric, but does not include agricultural use.

(25) Instream use - The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(26) Irrigation - The use of water for the irrigation of crops, trees, and pasture land, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(27) Irrigation water efficiency - The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from

the source(s) of supply. Beneficial uses of water for irrigation purposes include but are not limited to evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(28) Livestock use - The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in §142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and 71.001, respectively, of the Parks and Wildlife Code.

(29) Mariculture - The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(30) Mining use - The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(31) Municipal per capita water use - The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(32) Municipal use - The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, or the use of reclaimed water in lieu of potable water for the preceding purposes or the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(A) the application site is land owned or leased by the Chapter 26 permit holder; or

(B) the application site is within an area for which the commission has adopted a no-discharge rule.

(33) Navigable stream - By law, Natural Resources Code, §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(34) Nursery grower - A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(35) One-hundred-year flood - The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(36) Permit - The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(37) Pollution - The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(38) Priority - As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(39) Reclaimed water - Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(40) Recreational use - The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course, or similar development.

(41) Register - The *Texas Register*.

(42) Reservoir system operations - The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(43) Return water or return flow - That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(44) Reuse - The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state- owned water.

(45) River basin - A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(46) Runoff - That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(47) Secondary use - The reuse of state water for a purpose after the original, authorized use.

(48) Sewage or sewage effluent - Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(49) Spreader dam - A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(50) State water - The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water. State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(51) Stormwater or floodwater - Water flowing in a watercourse as the result of recent rainfall.

(52) Streamflow - The water flowing within a watercourse.

(53) Surplus water - Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(54) Unappropriated water - The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(55) Underflow of a stream - Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(56) Waste - The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or adjacent to water in the state so that it may be subsequently beneficially used.

(57) Water conservation plan - A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate planning document or may be contained within another water management document(s).

(58) Water in the state - Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(59) Watercourse - A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter with some degree of regularity, depending on the characteristics of the sources.)

(60) Water right - A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.

(61) Watershed - A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(62) Water supply - Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(63) Wetland - An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including, but not limited to, impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

This agency 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 July 26, 2002.

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Stephanie Bergeron
Division Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-5017

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SUBCHAPTER B. CLASSES OF WATER RIGHTS

30 TAC §297.15, §297.18

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
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SUBCHAPTER C. USE EXEMPT FROM PERMITTING

30 TAC §297.21

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.21. Domestic and Livestock and Wildlife Permit Exemptions.

(a) In accordance with Texas Water Code (TWC), §11.303(l), a person may directly divert and use water from a stream or watercourse for domestic and livestock purposes on land owned by the person and that is adjacent to the stream without obtaining a permit. Manner of diversion may be by pumping or by gravity flow. Such riparian domestic and livestock use is a vested right that predates the prior appropriation system in Texas and is superior to appropriative rights. A vested riparian right is only to the normal flow in the stream, not to the storm water, floodwater, or authorized releases from storage for downstream use.

(b) In accordance with TWC, §11.142, a person may construct on the person's own property a dam or reservoir with a normal storage of not more than 200 acre-feet of state water for domestic and livestock purposes without obtaining a permit. The reservoir may be on-channel, adjacent to the stream, or on a contiguous piece of property through which flows the stream from which the water is diverted. For purposes of this subsection, normal storage means the conservation storage of the reservoir, i.e., the amount of water the reservoir may hold before water is released uncontrolled through a spillway or into a standpipe. A person who temporarily stores more than 200 acre-feet of water in a dam or reservoir having a normal storage of greater than 200 acre-feet is not required to obtain a permit for the dam or reservoir if the person can demonstrate through reservoir capacity data and monthly reservoir water level records maintained by the owner that the person has not stored in the dam or reservoir more than 200 acre-feet of state water on average in any 12-month cycle. Selection of the 12-month cycle shall be at the owner's discretion, but must be consistent from year to year. This exemption does not apply to a commercial operation. Use of land for livestock purposes is not a commercial operation. This domestic and livestock exemption is not available to owners or property sold by a municipality having a population of 250,000 or less and owning land within 5,000 feet of where the shoreline of a lake would be if the lake were filled to its storage capacity, if the property was sold without notice or the solicitation of bids to the person leasing the land, in accordance with Local Government Code, §272.001(h).

(c) A dam constructed in accordance with subsection (b) of this section may not be located on a navigable stream.

(d) The use of a reservoir by free-ranging wild game and furbearing animals that may be harvested by hunters and trappers who pay a fee or other compensation to hunt or trap on the property does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir. Additionally, the use of water that is used in making products from a family garden or orchard that are traded with a neighbor or used in a local bake sale or potluck dinner does not constitute a use for which a permit must be obtained for an otherwise exempt domestic and livestock reservoir.

(e) In accordance with TWC, §11.142(b), a person may construct on the person's property a dam or reservoir with normal storage of not more than 200 acre-feet of water for wildlife management as defined in Texas Tax Code (TTC), §23.51(7), and for fish management purposes, excluding aquaculture or fish farming purposes, if the property on which the dam or reservoir will be constructed is qualified open-space land, as defined by TTC, §23.51. For purposes of this subsection, normal storage means the conservation storage of the reservoir, i.e., the amount of water the reservoir may hold before water is released uncontrolled through a spillway or into a standpipe. This exemption does not apply to a commercial operation. For the purposes of this subsection, commercial operation means the use of land for industrial facilities, industrial parks, aquaculture facilities, fish farming facilities, or housing developments. The incidental use of the reservoir in a manner that does not remove the land from the definition of qualified open-space land as defined by TTC, §23.51, including using a photograph in advertising, does not constitute a use for which a permit must be obtained for an otherwise exempt reservoir.

This agency 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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Stephanie Bergeron
Division Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-5017

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SUBCHAPTER E. ISSUANCE AND CONDITIONS OF WATER RIGHTS

30 TAC §§297.41 - 297.43, 297.51, 297.52

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.51. Time Limitations for Commencement or Completion of Construction.

When a water right is issued for appropriation by direct diversion or construction, modification or repair of a storage reservoir, or any work in which a time limitation is set by the water right for commencement or completion of construction, a water right holder shall commence and complete actual construction of the proposed facilities within the time fixed by the commission. Failure to commence or complete construction within the time specified in the permit or extension granted by the commission shall cause the water right holder to forfeit all rights to the

permit, subject to the provisions of §295.72 of this title (relating to Applications for Extensions of Time) and the provisions of §297.74 of this title (relating to Forfeiture and Revocation of Water Right).

This agency 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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Division Director, Environmental Law Division
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SUBCHAPTER F. AMENDMENTS TO WATER RIGHTS; CORRECTIONS TO WATER RIGHTS

30 TAC §297.61

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.61. Amendments by Executive Director.

(a) On the petition of the executive director, the commission may amend a permit, certified filing, or certificate of adjudication in order to:

(1) protect superior and senior water rights in the river basin, or in the case of transwatershed diversions of water, in the basin of origin;

(2) provide a reasonable means for the enforcement of the terms, conditions, provisions, and limitations contained in the water right;

(3) provide for the keeping and reporting of information and measurements in connection with the use of water;

(4) provide a reasonable means for the enforcement of applicable law;

(5) correct errors inadvertently made in the preparation of a water right, such as in the name of the water right holder, boundary description, or other detail incorrectly transcribed; or

(6) cure ambiguities or ineffective provisions in a water right.

(b) See §295.71 of this title (relating to Applications to Amend a Permit); see also §295.158 of this title (relating to Notice of Amendments to Water 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.

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SUBCHAPTER G. CANCELLATION, REVOCATION, ABANDONMENT, AND FORFEITURE OF WATER RIGHTS

30 TAC §§297.71, 297.73, 297.74

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

§297.71. Cancellation in Whole or in Part.

(a) Except as provided by subsection (b) of this section, if all or part of a water right has not been put to beneficial use during a consecutive ten year period, such water right is subject to cancellation in whole or in part as provided by this subchapter.

(b) A water right is not subject to cancellation as provided by subsection (a) of this section to the extent that such nonuse is the result of:

(1) the water right holder's participation in the Conservation Reserve Program authorized by the Food Security Act, Pub. L. No. 99-198, Secs. 1231-1236, 99 Stat. 1354, 1509-1514 (1985) or a similar governmental program;

(2) a significant portion of the water right has been used in accordance with a specific recommendation for meeting a water need included in the applicable regional water plan approved under Texas Water Code (TWC), §16.053;

(3) the deposit of the water right in the Water Trust for the maintenance of environmental flow needs in accordance with TWC, §15.7031;

(4) the deposit of the water right in the Texas Water Bank and the water right is protected from cancellation in accordance with TWC, §15.703;

(5) the water right was obtained to meet demonstrated long-term public water supply or electric generation needs as evidenced by a water management plan developed by the water right holder, and the water right is consistent with projections of future water needs contained in the state water plan; or

(6) the water right was obtained as the result of the construction of a reservoir funded, in whole or in part, by the holder of the water right, as part of the water right holder's long-term water planning.

This agency 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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Stephanie Bergeron
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For further information, please call: (512) 239-5017

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SUBCHAPTER J. WATER SUPPLY CONTRACTS AND AMENDMENTS

30 TAC §297.104

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.103, which provides the commission with authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state. Specific statutory authorization is derived from TWC, §§11.002, 11.023, 11.038, 11.085, 11.122, 11.134, 11.142, 11.146, 11.147, 11.173, 11.177, 16.012, and 16.059, as amended by HB 247 and SB 2, §§2.01 - 2.13, 2.15, and 4.17.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Division Director, Environmental Law Division
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For further information, please call: (512) 239-5017

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CHAPTER 305. CONSOLIDATED PERMITS

The Texas Natural Resource Conservation Commission (commission) adopts the amendments to §305.67, Revocation and Suspension Upon Request or Consent, and §305.541, Effluent Guidelines and Standards for Texas Pollutant Discharge Elimination System Permits, *without changes* to the proposed text as published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 3016) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments is to conform to certain United States Environmental Protection Agency (EPA) regulations, either by incorporating the federal regulations by reference or by introducing language which corresponds to the federal regulations.

On September 14, 1998, the State of Texas was authorized by EPA to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters in the state under the federal Water Pollution Control Act, as amended, 33 United States Code, §§1251 *et seq*. (commonly referred to as the Clean Water Act or CWA). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, 63 FR 51164 (September 24, 1998), is administered by the commission. The amendments to this chapter, necessitated by EPA revisions to its regulations, are part of the commission's effort to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

SECTION BY SECTION DISCUSSION

Subchapter D - Amendments, Renewals, Transfers, Corrections, Revocation, and Suspension of Permits

Section 305.67 is amended to make it compatible with 40 Code of Federal Regulations (CFR) §122.64 by adding provisions allowing for expedited termination of a permit where the entire discharge is eliminated. This change is based on revisions to 40 CFR §122.64, which established expedited permit termination procedures applicable where the entire discharge is permanently terminated by elimination of the flow or by connection to a publicly-owned treatment works (POTW), but not by land application or disposal into a well.

The adopted amendment to §305.67 allows the executive director to terminate a TPDES permit by giving notice to the permittee where the permittee has permanently terminated its entire discharge by elimination of the process flow or other discharge components or by redirecting its discharge into a POTW. This termination option is not available when the permittee is subject to pending state and/or federal enforcement actions, including citizen suits brought under state and federal law.

Subchapter P - Effluent Guidelines and Standards for TPDES Permits

Section 305.541 is amended to incorporate by reference 40 CFR Parts 437, 442, 444, and 445 concerning effluent limitations guidelines, pretreatment standards, and new source performance standards for certain newly designated categories of point sources, which were promulgated by EPA subsequent to delegation of the TPDES program. Part 437 addresses the Centralized Waste Treatment Point Source; Part 442 addresses the Transportation Equipment Cleaning Point Source; Part 444 addresses the Waste Combustors Point Source; and Part 445 addresses the Landfills Point Source. The new effluent limitations guidelines are technology based.

There are at least 31 direct dischargers in Texas that fall under a Source Identification Code to which these standards apply. Currently, no indirect dischargers (e.g., dischargers discharging to a POTW) have been identified by cities with approved pretreatment programs that would be impacted by Parts 444, 445, and 437. In regard to 40 CFR Part 442, some operators will be impacted by this EPA requirement; however, due to its newness, the total number subject to it is not known at this time.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The adopted rulemaking 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 amendments would update consolidated permits rules to incorporate certain federal regulations regarding NPDES permitting requirements. The

amendments do not meet the definition of a "major environmental rule" as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required because the proposed amendment does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission assessed the adopted amendments in accordance with Texas Government Code, 2007.043. The specific purpose of the rulemaking is to ensure that consolidated permits requirements are equivalent to EPA NPDES permitting regulations. The adopted amendments would substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. The 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 reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the adopted rules are subject to the CMP and must be consistent with applicable CMP goals and policies in 31 TAC §501.12 and §501.14. The rulemaking will conform commission rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The NPDES requirements incorporated in the commission's rules are consistent with and will aid in achieving CMP goals and policies. The commission also determined that the rulemaking will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

PUBLIC COMMENT

A public hearing was not held on this rulemaking. The public comment period closed May 13, 2002, and no comments were received.

SUBCHAPTER D. AMENDMENTS, RENEWALS, TRANSFERS, CORRECTIONS, REVOCATION, AND SUSPENSION OF PERMITS

30 TAC §305.67

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

This agency 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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Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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SUBCHAPTER P. EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS

30 TAC §305.541

STATUTORY AUTHORITY

The amendment is adopted under TWC, §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

This agency 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 308. CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SUBCHAPTER K. CRITERIA AND STANDARDS FOR BEST MANAGEMENT

PRACTICES AUTHORIZED UNDER THE CLEAN WATER ACT, §304(e)

30 TAC §308.121

The Texas Natural Resource Conservation Commission (commission) adopts the repeal of Subchapter K, Criteria and Standards for Best Management Practices Authorized under the Clean Water Act, §304(e), §308.121, *without change* as published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 3019).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of the rulemaking is to eliminate a provision that incorporated by reference a regulation of the United States Environmental Protection Agency (EPA), which EPA has now removed from its regulations.

On September 14, 1998, the State of Texas was authorized by EPA to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters in the state under the federal Water Pollution Control Act, as amended, 33 United States Code, §§1251 *et seq*. (commonly referred to as the Clean Water Act or CWA). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, 63 FR 51164 (September 24, 1998), is administered by the commission. The repeal of Subchapter K, necessitated by EPA revisions to its regulations, is part of the commission's effort to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

SECTION DISCUSSION

Section 308.121, Criteria and Standards for Best Management Practices Authorized under the Clean Water Act, §304(e), which adopted by reference 40 Code of Federal Regulations (CFR) Part 125, Subpart K (Subpart K), is repealed to comply with EPA removal of Subpart K from its regulations. This provision would have established criteria and standards for imposing best management practices (BMPs). However, Subpart K was never activated and EPA said that the original purpose of this regulation "is now better served by EPA's existing BMPs provisions in 40 CFR §122.44(k), and accompanying guidance for developing and implementing BMPs (65 FR 30886 and 30900, May 15, 2000)." Since the rule was never activated, no entities in Texas are impacted by the repeal.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. Because the specific intent of the adopted rulemaking is to repeal a rule that incorporated a provision in EPA regulations, that was never activated and has now been removed, and does not add regulatory requirements to existing rules, the rulemaking is not anticipated to have an adverse material effect on 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. Therefore, this rulemaking does not meet the definition of a "major environmental rule" as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required because the proposed amendment does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the repeal and performed an assessment of the rulemaking in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to repeal a rule that incorporated a provision in EPA regulations, that was never activated and has now been removed, and does not add regulatory requirements to existing rules. The 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 and would not affect private real property, restrict or limit the owner's right to property that otherwise would exist in the absence of the rulemaking, or be the producing cause of the reduction in the market value of private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the rule is subject to the CMP and must be consistent with applicable CMP goals and policies in 31 TAC §501.12 and §501.14. The rulemaking will conform commission rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The repeal is consistent with CMP goals and policies. The commission also determined that the rulemaking will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

PUBLIC COMMENT

A public hearing was not held on this rulemaking. The public comment period closed May 13, 2002, and no comments were received.

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state. The repeal conforms the commission's regulations to corresponding EPA regulations under the CWA.

This agency 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 July 26, 2002.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-6087

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CHAPTER 319. GENERAL REGULATIONS INCORPORATED INTO PERMITS
SUBCHAPTER A. MONITORING AND REPORTING SYSTEM

30 TAC §319.9, §319.11

The Texas Natural Resource Conservation Commission (commission) adopts the amendments to §319.9, Self-Monitoring and Quality Assurance Schedules, and §319.11, Sampling and Laboratory Testing Methods, *without changes* to the proposed text as published in the April 12, 2002, issue of the *Texas Register* (27 TexReg 3021) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The amendments to §319.9 and §319.11 are adopted in order to address changes to United States Environmental Protection Agency (EPA) regulations. On September 14, 1998, the State of Texas was authorized by EPA to administer and enforce the National Pollutant Discharge Elimination System (NPDES) program for regulating discharges of pollutants into waters in the state under the federal Water Pollution Control Act, as amended, 33 United States Code, §§1251 *et seq*. (commonly referred to as the Clean Water Act or CWA). The approved state program, i.e., the Texas Pollutant Discharge Elimination System (TPDES) program, 63 FR 51164 (September 24, 1998), is administered by the commission. The amendment to §319.9 is part of the commission's effort to revise several chapters of its rules to maintain equivalency with EPA regulations and to thereby maintain delegated NPDES permitting authority.

The amendment to §319.11 clarifies that analytical methods as described in more recent versions, as well as the latest version of *Standard Methods for the Examination of Water and Wastewater (Standard Methods)*, are acceptable to the commission. The existing language contained within §319.11 refers to 40 Code of Federal Regulations (CFR) Part 136 and the latest edition of *Standard Methods*. The EPA rules generally cite the 18th Edition of *Standard Methods*. However, laboratories may be using 18th, 19th, 20th, or, in the near future, the 21st editions of *Standard Methods*. The commission received inquiries from staff and commercial laboratory personnel concerning the application of the rule. It is not the intent to cite use of the older *Standard Methods* as a violation of §319.11(b).

SECTION BY SECTION DISCUSSION

Section 319.9 is amended to add organic quality control analyses for pharmaceutical pollutants. Existing §319.9(c) analyses for organics are limited to Gas Chromatography (GC) and Gas Chromatography/Mass Spectroscopy (GC/MS). However, due to 40 CFR Part 439, Pharmaceutical Manufacturing Point Source Category, §319.9(c) is amended to allow additional analytical methods acceptable to EPA. Part 136 of 40 CFR was amended to include additional methods for pharmaceuticals, found in Table 1F, List of Approved Methods for Pharmaceutical Pollutants. These methods include the use of High Performance Liquid Chromatography (method 1667) and Fluorescence Spectroscopy (method D4763). Currently, permittees are unable to comply with the quality assurance requirements specified in §319.9(c), Table 3, since organics are limited to analyses with GC and GC/MS. The entities impacted are direct and indirect dischargers of wastewater subject to 40 CFR Part 439.

Section 319.11 is amended to clarify that effluents may be analyzed according to test methods specified in 40 CFR Part 136 or more recent editions of *Standard Methods* than that cited in Part 136. Currently, EPA rules reference the 18th edition of *Standard Methods*. However, laboratories may be using 18th, 19th, 20th, or, in the near future, the 21st editions of *Standard Methods*. The commission received inquiries from staff and commercial laboratory personnel concerning the application of the rule. 40 CFR Part 136 generally sites the 18th edition of *Standard Methods*. It is not the commission's intention to cite use of the 19th, or future, editions of *Standard Methods* as a violation of §319.11(b). Therefore, the rule is being revised to allow use of more recent editions of *Standard Methods* than cited in the federal regulations as well as the latest edition. The revision maintains existing regulatory flexibility and eliminates unintended permit violations. All wastewater permittees are affected by the adopted amendments.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in §2001.0225(g)(3), and because it does not trigger any of the four criteria in §2001.0225(a). The amendments 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 amendments will update permit rules to incorporate certain federal regulations regarding NPDES permitting requirements. The amendments do not meet the definition of a "major environmental rule" as defined in the Texas Government Code, because §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The commission concludes that a regulatory analysis is not required because the proposed amendment does not trigger any of the four criteria in Texas Government Code, §2001.0225.

TAKINGS IMPACT ASSESSMENT

The commission performed an assessment of these adopted amendments in accordance with Texas Government Code, §2007.043. The specific purpose of the rulemaking is to ensure

that permit requirements are equivalent to EPA NPDES permitting regulations. The adopted amendments will substantially advance this stated purpose by adopting language intended to ensure that state rules are equivalent to the corresponding federal regulations. This 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 reviewed this rulemaking for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council and found that the rules are subject to the CMP and must be consistent with applicable CMP goals and policies in 31 TAC §501.12 and §501.14. The rulemaking will conform commission rules to EPA requirements for regulating discharges of pollutants under the CWA to maintain delegated NPDES permitting authority. The NPDES requirements incorporated in the commission's rules are consistent with and will aid in achieving CMP goals and policies. The commission also determined that the rulemaking will not have a direct or significant adverse effect on any coastal natural resource areas, nor will the rulemaking have a substantive effect on commission actions subject to the CMP.

PUBLIC COMMENT

A public hearing was not held on this rulemaking. The public comment period closed May 13, 2002. Reliant Energy submitted written comments.

RESPONSE TO COMMENTS

Reliant Energy filed comments supporting the proposed amendments to Chapter 319 in which it stated that the amendments will clarify the analytical methods available for wastewater analysis; provide for the use of more sensitive methods from recent editions of *Standard Methods*; and improve data quality.

The commission appreciates the support expressed for the amendments to Chapter 319 and concurs with the assessment of associated benefits.

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

This agency 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-200204711

Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 19. STATE ENERGY CONSERVATION OFFICE

SUBCHAPTER A. GENERAL PROVISIONS

34 TAC §19.1, §19.2

The Comptroller of Public Accounts adopts new §19.1 and §19.2, concerning the purpose of the State Energy Conservation Office (SECO) and the SECO business office location and mailing address, without changes to the proposed text as published in the February 15, issue of the *Texas Register* (27 TexReg 1104).

These new sections are adopted under Texas Administrative Code, Title 34, Part 1, new Chapter 19: State Energy Conservation Office, Subchapter A: General Provisions, and relate to the functions and responsibilities of SECO, pursuant to House Bill 2914, House Bill 2278, and House Bill 3286, 77th Legislature, 2001.

House Bill 2914, transfers to the comptroller all the functions and activities of the General Services Commission that relate to energy conservation under Government Code, Chapter 447 or Chapter 2305. Government Code, §447.001, establishes the State Energy Conservation Office in the comptroller's office; Government Code, §447.002, directs the state energy conservation office to make rules relating to the adoption and implementation of energy conservation programs applicable to state buildings and facilities; and Government Code, §2305.011, authorizes the comptroller to adopt rules as necessary to administer the programs prescribed by Government Code, Chapter 2305, relating to restitution for oil overcharges. These provisions of House Bill 2914 were effective immediately.

House Bill 2278, September 1, 2001, amends Government Code, Chapter 447 and Chapter 2305, relating to the consolidation and functions of the Energy Management Center and the State Energy Conservation Office and to the transfer of the powers and duties of the center and the office to the comptroller's office.

House Bill 3286, effective September 1, 2001, amends Government Code, Chapter 447, to include water conservation along with energy conservation among the duties of the State Energy Conservation Office relating to state buildings and facilities.

No comments were received regarding adoption of the new section.

These new sections are adopted under Government Code, §447.002 and §2305.011, which authorize the comptroller and the State Energy Conservation Office to adopt rules relating to energy and water conservation for state buildings and facilities and to the LoanSTAR Revolving Loan Program.

The new sections implement Government Code, §§447.001, 447.002, and 2305.032.

This agency 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 July 24, 2002.

TRD-200204565
Martin Cherry
Deputy General Counsel for Taxation
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Effective date: August 13, 2002
Proposal publication date: February 15, 2002
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SUBCHAPTER B. STATE FACILITY ENERGY AND WATER MANAGEMENT

34 TAC §§19.11 - 19.19

The Comptroller of Public Accounts adopts new §§19.11-19.19, concerning state facility energy and water management. New §§19.11, 19.12, 19.13 and 19.14 are adopted with changes to proposed text as published in the February 15, 2002 issue of the *Texas Register* (27 TexReg 1105). New §§19.15, 19.16, 19.17, 19.18 and 19.19 are adopted without changes to the proposed text as published in the February 15, 2002 issue of the *Texas Register* (27 TexReg 1105).

These new sections are adopted under Texas Administrative Code, Title 34, Part 1, new Chapter 19: State Energy Conservation Office, Subchapter B: State Facility Energy and Water Management, and relate to the functions and responsibilities of SECO. The new sections are adopted to implement the requirements of House Bill 2914, House Bill 2278, and House Bill 3286, enacted by the 77th Texas Legislature, 2001. The new sections also implement other provisions of Chapters 447 and 2305, Government Code.

House Bill 2914 (Acts 2001, 77th Legislature, Chapter 1158, §28), transfers to the comptroller all the functions and activities of the General Services Commission that relate to energy conservation under Government Code, Chapter 447 or Chapter 2305. Government Code, §447.001, establishes the State Energy Conservation Office in the comptroller's office; Government Code, §447.002, directs the State Energy Conservation Office to develop rules relating to the adoption and implementation of energy conservation programs applicable to state buildings and facilities; and Government Code, §2305.011, authorizes the comptroller to adopt rules as necessary to administer the programs prescribed by Government Code, Chapter 2305, relating to restitution for oil overcharges. These provisions of House Bill 2914 were effective June 15, 2001 .

House Bill 2278 (Acts 2001, 77th Legislature., Chapter 1398, §1), effective September 1, 2001, amends Government Code, Chapter 447 and Chapter 2305, relating to the consolidation and functions of the Energy Management Center and the State Energy Conservation Office and to the transfer of the powers and duties of the center and the office to the comptroller's office.

House Bill 3286 (Acts 2001, 77th Legislature, Chapter 573, §10), effective September 1, 2001, amends Government Code, Chapter 447, to include water conservation along with energy conservation among the duties of the State Energy Conservation Office relating to state buildings and facilities.

§19.11 states the purpose of the rules related to state facility energy and water management; §19.12 provides that the rules apply generally to state agencies and institutions of higher education that occupy state-owned buildings or that otherwise incur utility costs; §19.13 provides definitions of terms used in 34 TAC, Chapter 19, Subchapter B; §19.14 outlines the requirements for utility management planning for state agencies and institutions of higher education; §19.15 addresses implementation of the Resource Efficiency Plan recommendations; §19.16 outlines the requirements for the Long Range Utility Services Plan; §19.17 requires each state agency and institution of higher education to review and audit utility billings and contracts to detect billing errors; §19.18 specifies the requirements for semiannual reporting; §19.19 outlines the process for obtaining an extension of time to file plans and reports. Changes in the adopted rules respond to public comments. The changes affect no new persons, entities, or subjects other than those given notice and compliance with the adopted sections will be less burdensome than under the proposed sections. Accordingly, republication of the adopted sections as proposed amendments is not required.

The agency received several comments to the proposed rules. Comments were received from: Texas Workers Compensation Commission, Texas Building and Procurement Commission, Texas Department of Criminal Justice, Texas Comptroller of Public Accounts, Good Company Associates, York International Corporation, The American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc., Hellmuth, Obata + Kassabaum, Piazza Engineering Incorporated, HDR Architecture, Inc., ms2 Inc., and ACR Engineering, Inc.

Two comments were received, from the same commenter, regarding the comptroller's fiscal estimate contained in the preamble to the proposed rules. The Texas Department of Criminal Justice commented that the rule would cause state agencies to incur engineering costs for conducting facility assessments and for implementation of energy and water conservation programs or measures. The original fiscal estimate does not need to be revised in response to this comment. The adopted rules do not create any additional revenue impact on state or local governments, beyond what is already required by the existing statutes. Chapter 447, Government Code, already requires state agencies and institutions of higher education to develop comprehensive energy and water management plans. Plans cannot be developed without first conducting a facility assessment, to determine what energy or water conservation measures should be proposed in the plans. State agencies and institutions of higher education can have preliminary facility assessments performed at no cost or obligation to the agency or institution. §447.002, Government Code, as amended by House Bill 2914, §28, 77th Legislature, 2001, already requires a state agency to implement an energy or water conservation measure or program in accordance with the plans developed by the agency under Chapter 447. §447.010(a)(4), as amended by House Bill 2278, 77th Legislature, 2001, requires state agencies to adopt cost-effective efficiency measures and programs for all state facilities by September 1, 2006. The rules and the statute, § 447.002, Government Code, as amended by House Bill 2278, 77th Legislature, 2001, envision that implementation of energy and water conservation

measures or programs will be performed using available funding, including funding from a financing method prescribed by §2166.406, Government Code. § 2166.406, Government Code, as amended by the 77th Legislature, Chapter 573, §9, §13, and Chapter 1319, §3 (2001) specifies that energy or water conservation measures may be financed under a lease/purchase contract, with the proceeds of bonds, or under a contract with the provider of the energy or water conservation measures that has a term not to exceed 15 years from the final date of installation. §2166.406 also provides that a state agency may enter into a contract for a period of more than one year for energy or water conservation measures with an entity if the state agency finds that the amount the state agency would spend on the energy or water conservation measures will not exceed the amount to be saved in energy, water, wastewater and operating costs over 15 years from the date of installation. Thus, the energy and water conservation measures and programs that are required by the existing statutes are designed to be revenue neutral, with the costs of implementation to be offset by the savings in energy, water, wastewater and operating costs.

One comment was received from Good Company Associates concerning §19.11, Purpose. The comment suggested the proposed language does not explicitly direct agencies to investigate all potential avenues for financing and/or implementing cost effective comprehensive projects. The comptroller agrees that, as a matter of fiscal responsibility, to achieve long term savings in energy and water-related costs, state agencies and institutions of higher education should investigate all potential avenues for financing appropriate energy and water conservation measures or programs, including the mechanisms specified in §2166.406, Government Code. Therefore, the comptroller agrees to revise the section as recommended by the comment to reflect that goal. However, the comptroller points out that §19.11 is not intended to be directive; instead, the section outlines the purpose of the rules. Furthermore, the adopted rules are drafted to be consistent with the statutory directives and are not intended to go beyond the statutory requirements. §447.002, Government Code, as amended by House Bill 2278, 77th Legislature, 2001, states that the state energy conservation office "shall adopt rules requiring a state agency to implement an energy conservation measure or program in accordance with the plans developed under §447.010 if: (1) the measure or program meets the eligibility requirements of §2166.406; and (2) funding is available, including funding from a financing method prescribed by §2166.406." Thus, before a measure or program is required to be implemented, it must meet the eligibility requirements of Government Code §2166.406, and there must be available funding. Furthermore, consistent with both §447.002 and §447.010, Government Code, as amended by House Bill 2278, 77th Legislature, 2001, while both state agencies and institutions of higher education are required to prepare comprehensive energy and water management plans, only state agencies are required to implement energy or water conservation measures or programs.

The comptroller received several comments on proposed §19.12. The Texas Workers' Compensation Commission sought clarification of rule applicability to state agencies that have "full service" leases where the utilities are paid indirectly through the lease. To help clarify, new §19.12(b)(3) and §19.14(d) both address leased space. §19.12(b)(3) and §19.14(d) mean that if a state agency occupies a building that the state does not own (through a lease, for example), the agency should prepare a Resource Efficiency Plan which contains only those components of a plan that address the agency's particular circumstances. Every state agency that occupies leased space can at least implement employee awareness programs to reduce the use of energy and water in its occupied space. In the case of an agency with a "full service" lease, the main component of that agency's Resource Efficiency Plan might consist of just a Utility Awareness Plan, to affect energy and water use and employee behavior to the extent such actions can result in savings in utility related lease costs. Reducing the energy and water use in "full service lease" facilities should help keep the costs of such leases down. Changing employee behavior to reduce utility use might affect future lease renewal terms, or provide incentives for negotiation, as well as benefit the environment. The comptroller has revised §19.12 to further clarify this applicability.

With respect to §19.12(b)(1), one comment was received from the Texas Workers' Compensation Commission requesting a clarification of the terms "provision of utilities" and "supply of utilities" as they relate to the process of assignment of the responsibility for the preparation and implementation of a Resource Efficiency Plan. The comptroller agrees that the use of the terms "provision of utilities" and "supply of utilities" should be consistent in §19.12(b)(1) and has changed the word "supply" to "provision" for consistency. With respect to §19.12(b)(2) and (3), the commenter also suggested that a "lead agency" in a multi-tenant lease should be the responsible party. The comptroller has slightly revised §19.12 to further clarify responsibilities of managing state agencies and using state agencies, but the comptroller believes that all state agencies that occupy a state owned building (whether a major tenant or a minor tenant) have responsibilities to take actions within their control to address a more efficient use of energy and water in that building. A state agency (the "managing state agency") that is responsible for the provision of utilities used in buildings occupied by other state agencies (the "using agency") has the primary responsibility for developing and implementing the Resource Efficiency Plan covering that building. Since managing agencies are expected to use the savings achieved through energy and water cost reduction measures to pay for those measures, it is justifiable to have the managing agency as the party responsible for the development and implementation of the Resource Efficiency Plan. However, the using agency also has a role to address how the using agency can contribute towards a reduction in the energy or water use of the building. §19.12(b)(2) outlines the applicability of the rules to using agencies. The using agency is required to develop a Resource Efficiency Plan that contains those provisions of the plan that are applicable to the unique situation of the using agency. The using agency's plan might consist primarily of the Utility Awareness Plan outlined in §19.14(c)(5), to address employee conduct in reducing energy and water usage. §19.12(b)(2) provides that a using agency must coordinate the development of its plan with the managing agency, to ensure the plans are complementary, and the using agency must assist the managing agency in the development of the managing agency's Resource Efficiency Plan. The responsibilities of state agency tenants occupying buildings not owned by the state are outlined in §19.12(b)(3), which again addresses the tenant's responsibility to develop a Resource Efficiency Plan that is tailored to the unique situation of the tenant. For the tenant of a non-state owned building, the Resource Efficiency Plan, as a minimum, must consist of the Utility Awareness Plan described in §19.14(c)(5), and the tenant should take actions to affect energy and water use and employee behavior to the extent such actions can result in potential savings in utility-related lease costs.

The Texas Building and Procurement Commission commented that a using agency's plans should support those items, efforts and retrofits identified in the utility audit reports initiated by the managing agency and that the using agency should be required to show good cause before rejecting a provision of the managing agency's plan. The comptroller agrees that a using agency should support the managing agency's Resource Efficiency Plan and has revised the language of §19.12(b)(2) accordingly. However, the addition of "good cause" language is unnecessary, because the rule language already specifies that the using agency should cooperate with the managing agency, by assisting the managing agency in the preparation and implementation of the managing agency's Resource Efficiency Plan, and requiring the using agency to coordinate its Resource Efficiency Plan with the managing agency.

The Texas Workers' Compensation Commission commented about possible duplication of plans by state agencies occupying state owned buildings. The commenter recommended that a "lead agency" be required to either do its own plan or assist the managing agency in a plan that encompasses the whole facility. The comptroller disagrees that there will be duplication of plans, and no further revision of §19.12 is needed in response to this comment. Each state agency occupying space in a state owned building has a role in minimizing or reducing the energy or water related costs associated with use of the building. §19.12 outlines the different responsibilities for managing state agencies and using state agencies. §19.12(b)(1) requires the using agency to assist the managing agency in the development of the managing agency's plan. §19.12(b)(2) requires the using agency to coordinate the development of its plan with the managing agency. Each plan should be unique to each agency, addressing how that particular agency will be involved in addressing the utility use that is within the agency's ability to control. Accordingly, it should be the responsibility of each agency to develop and implement a plan that either affects it's own employees, or otherwise encompasses actions that the particular agency can take to affect utility use.

With respect to §19.12(b)(3), a comment from the Texas Workers' Compensation Commission was received that questioned the applicability of the rules to agencies that occupy leased facilities that are "full service", in which utilities are included as part of the lease cost. The comment recommended that any requirements "at least be made subject to the lease contract terms." The comptroller disagrees that further revision is necessary, because §19.12(b)(3) provides enough latitude for agencies that occupy full service leased space to tailor their Resource Efficiency Plans to the unique situation of the leasing agency. An agency that occupies a building not owned by the state in its discretion can tailor its plan so that it does not contravene any provisions of the lease.

The comptroller has also revised §19.12 and §19.14(b) to address comptroller staff member concerns about the logistical requirements involved in receiving and storing Resource Efficiency Plans submitted at the same time from all state agencies and institutions of higher education. §19.12 and §19.14(b) have been revised to provide that agencies and institutions should prepare their Resource Efficiency plans, but do not have to submit them to the state energy conservation office until requested to do so by the office. Instead of submitting the actual plans by the deadline specified in §19.14(b) (October 31 of each even numbered year), agencies and institutions will have to submit notification to the state energy conservation office that the agency's or institution's plans have been prepared. Thus, the office can plan for a staggered submittal of plans, based on staff availability to review those plans.

With respect to §19.13, Definitions, the Texas Building and Procurement Commission commented that, for consistency with other sections of the rule, subsections in §19.13 should be identified by letter rather than number. The comptroller disagrees with this comment. The normal protocol for numbering subsections in a definition section is to use numbers rather than letters.

With respect to §19.13(1), the Texas Building and Procurement Commission requested clarification of the meaning of related capital upgrades, repairs, and maintenance appropriations in terms of ability to use appropriated funds for utility efficiency improvements. In terms of clarification, the comptroller considers the following as coming within the meaning of "appropriated utility funds" and available as potential sources of funding to pay for utility efficiency improvements: any funds that are appropriated for utility efficiency improvements; appropriations for capital upgrades, repairs or maintenance that are energy or water related; funds appropriated for operations of utility systems; funds that would ordinarily be allocated to pay for utility expenses, and funding from a method that is prescribed by Government Code, §2166.406. Funding from these sources would allow the agency to use the realized utility savings to buy down the financing of the projects, and then to begin a new round of energy and water cost reduction measures, or for other purposes allowed by state law. For example, Government Code §447.010, as amended by House Bill 3286, §10 (Acts 2001, 77th Legislature, Chapter 573, §10) provides that a state agency that reduces its energy expenses may use any funds saved by the agency from appropriated utility funds for the purchase of energy-saving or water-saving devices or measures. Government Code §2166.406(m) (as amended by Acts 2001, 77th Legislature, Chapter 573, §9, §13) provides that the legislature shall base an agency's appropriation for energy, water, and wastewater costs during a fiscal year on the sum of (1) the agency's estimated energy, water, and wastewater costs for that fiscal year; and (2) if a contract under §2166.406 is in effect, the agency's estimated net savings resulting from the contract during the contract term, divided by the number of years in the contract term.

One comment was received for §19.13(6), from the Texas Workers' Compensation Commission recommending clarification of the definition of "managing state agency". The comment points out that utilities are "supplied" by vendors and not the responsibility of a state agency. The comment suggests a "lead agency" concept. The comptroller agrees that clarification is necessary and has revised the definition of "managing agency" to mean a state agency that is responsible for the provision of utilities used in the buildings or facilities occupied by other state agencies. In this case, the managing agency would be like a "lead agency" in that the managing agency is the agency that arranges for utility service for buildings occupied by other state agencies.

One comment was received from Good Company Associates on the definition of "resource efficiency measure" in §19.13(8), suggesting a clarification that load control or load management measures can be a component of state agency resource efficiency plans. The comment also suggested that this change would bring this definition in line with §19.14(c)(3). The comptroller agrees and has revised the definition of "resource efficiency measure" by inserting the word "costs" after "consumption" so

that resource efficiency measure is now defined as "any cost effective measure that is designed to reduce utility consumption costs and related operating costs of governmental facilities".

One comment was received from the Texas Department of Criminal Justice on the definition of Utility Assessment Report in §19.13(14) suggesting this definition be deleted and that the term Preliminary Energy Audit (PEA) be defined in its place. The commenter also asked the office to make it clear that agency assigned engineers can perform a Preliminary Energy Audit. The comptroller agrees to add a definition of Preliminary Energy Audit, but does not agree to delete the definition of Utility Assessment Report. In terms of identifying and designing utility efficiency improvements, there are valid roles for both the preliminary audit and a more detailed utility assessment report. A preliminary energy audit can be used to identify potential opportunities for savings and can serve as a basis for planning. However, for comprehensive identification and design of all cost effective utility and utility related operational efficiency measures, a detailed utility assessment report may need to be completed. It will be the agency or institution's choice on whether to utilize a preliminary energy audit or utility assessment report, depending on time constraints, staff expertise, resources or other factors. The comptroller has revised §19.14(c)(2) to allow preliminary energy audits to be performed as an option for constructing the Resource Efficiency Plan. And, in response to the commenter's request, the comptroller confirms that agency or institution-assigned engineers can perform preliminary energy audits, if the engineers have the necessary expertise. If agencies are concerned about the cost of PEA's, these can be obtained for free and the cost of any Utility Awareness Report would be part of the cost of an overall retrofit program and paid for with the realized savings.

One general comment was received from the Texas Building and Procurement Commission on §19.14, Utility Management Planning, suggesting that the comptroller not adopt the rule until all required report formats are made available. The comptroller declines to postpone adoption of the rule. The State Energy Conservation Office will have all report formats available on it's website by the time of adoption of the rule, or soon thereafter. The formats of any required submissions will be specified well in advance of any deadlines for submission. And further, the comptroller has revised §19.14(b) of the rule, to require that agencies and institutions submit a certification that they have completed their plans, rather than having to submit their plans by October 31. Instead, agencies and institutions will submit their plans to SECO within 30 days of a request, and the request from SECO will not come any earlier than the October 31 deadline for having the initial plan prepared.

One comment was received from the Texas Department of Criminal Justice on §19.14(b) suggesting that the deadline for completing the first Resource Efficiency Plan be changed to at least October 31, 2003 since the rule adoption has been delayed. The comptroller declines to change the initial deadline for completion of the initial plans. With the continued rise in energy costs, it is important that agencies and institutions not delay in planning ways to make utility use more efficient. In addition, §19.19 of this rule provides SECO with the ability to extend any deadline for good cause. SECO understands the complexities of plan development, but initial planning should be undertaken so that any additional funding requests can be made to the 78th Legislature, if needed. SECO will work with agencies or institutions on an individual basis as needed to ensure they develop a timely schedule of preparation and implementation of their individual resource efficiency plans.

The comptroller has also revised §19.14(b) to provide that agencies and institutions must submit a plan completion certification document to SECO, by the October 31 deadline, rather that submitting the plan itself. A new subsection (e) has been added to specify that after the deadline for completing or updating a Resource Efficiency Plan has passed, SECO may require a state agency or institution of higher education to submit its Resource Efficiency Plan to SECO for review. The Resource Efficiency Plan should be submitted to SECO within 30 days of receiving a request from SECO to submit the plan. This change is being made for administrative efficiency purposes, to allow SECO staff to plan and manage a staggered review of individual agency or institution plans.

Three comments were received on §19.14(c)(2). One comment from the Texas Workers' Compensation Commission concerned the cost to state agencies for the preparation of detailed assessments by professional engineers because state agencies may not have professional engineers on staff. The comptroller has revised modified §19.14(c)(2) in response to this comment to allow agencies or institutions to perform a Preliminary Energy Audit , in place of a detailed Utility Assessment Report .

Another comment from the Texas Department of Criminal Justice pointed out that as defined in §19.13, a Utility Assessment Report (UAR) is really a detailed audit and could pose compliance problems for state agencies. The commenter recommended SECO change this requirement to allow use of a Preliminary Energy Audit for the purpose of planning. The comptroller agrees with this comment, and has revised §19.14(c)(2) to allow agencies or institutions discretion in choosing to use either Utility Assessment Reports or Preliminary Energy Audits as a basis for completing their Resource Efficiency Plans.

Another comment on §19.14(c)(2) from Good Company Associates suggested inserting the word "all" before "cost effective measures", to better clarify that no potential saving be overlooked. The comptroller agrees that agencies or institutions should explore all potential cost effective resource efficiency measures, but has declined to revise the rule, to preserve the discretion of agencies and institutions to determine the recommendations to include in their plans.

The agency received a comment from the Texas Department of Criminal Justice on §19.14(c)(3), regarding Implementation Schedule, suggesting changing the section to read "an implementation schedule that describes how the agency or institution plans to achieve the agency established goals and a strategy for monitoring the status of implementation of the Resource Efficiency Plan". The comptroller declines to revise the section as requested, because the current wording of §19.14(c)(3) calls for delineating how the agency or institution plans to implement the cost effective resource efficiency measures outlined in the plan, and not just a strategy for monitoring implementation. The comptroller has revised the section to include the ability to use Preliminary Energy Audits for the purposes of planning, to reflect changes made to §19.14(c)(2).

A comment on §19.14(c)(7) was received from the Texas Workers' Compensation Commission concerning the ability of agencies occupying "full service" leases to obtain the required utility information. The comment suggested the rule address and allow for such contingencies. The comptroller declines to revise the subsection, because the revisions to §19.12 and §19.14(d)

already make clear that agencies or institutions only have to complete those portions of the Resource Efficiency Plan that are applicable to the agency's situation. Thus, a lessee state agency has the discretion to tailor its plan to the information that it has available.

Two comments were received on §19.14(c)(8). One comment from the Texas Workers' Compensation Commission cited the inability of agencies in leased space to implement a savings and monitoring plan. The comptroller disagrees that §19.14(c)(8) needs to be revised. The comptroller believes §19.12(b)(3) and §19.14(d) provide sufficient flexibility for agencies in leased facilities regarding plan requirements, in that such agencies can tailor the components of their plan to match their unique circumstance.

The other comment, from the Texas Department of Criminal Justice suggests changing "UAR" to "PEA" in §19.14(c)(8), but gave no reasoning for the suggestion. The comptroller disagrees with this suggestion. Preliminary Energy Audits only identify viable cost effective projects. A Utility Assessment Report needs a monitoring and evaluation plan to ensure the details of the projected savings. If the commenter was concerned with their ability to prepare a UAR, they have the ability to explain circumstances in their reports to SECO.

One comment from the Texas Building and Procurement Commission was submitted on §19.14(c)(11) suggesting that using agencies be required to submit an ample number of copies of their Resource Efficiency Plans to the managing agency. The comptroller understands the need of the managing agency to have enough copies of using agency plans as necessary to complete the compilation and integration of those plans. However, for administrative efficiency, agencies should have the flexibility to provide plans electronically to save paper and the related publishing costs. For these reasons, the comptroller declines to revise this section to specify numbers of copies to be provided.

Two comments were received concerning §19.15, Implementation of Resource Efficiency Plan Recommendations. One comment from Good Company Associates suggested new language to clarify that state agencies take advantage of the synergies available through comprehensive projects. The comptroller declines to revise the section, because the wording of §19.15 already encourages state agencies to implement comprehensive projects to the extent feasible.

The other comment on §19.15, from the Department of Criminal Justice concerned the September 1, 2006 deadline for adoption of qualified cost effective efficiency measures for all state-owned facilities and suggested a two year delay. The comptroller declines to revise the rule, because September 1, 2006 is a statutory deadline and cannot be extended by rule. (See V.T.C.S., Government Code §447.010(a)(4), as amended by House Bill 2278, 77th Legislature, ch. 1398, §1, effective September 1, 2001).

One comment from the Texas Building and Procurement Commission was submitted for §19.18, Semiannual Reporting, suggesting that using agencies be required to submit an ample number of copies of their Resource Efficiency Plans to the managing agency. The comptroller disagrees with the need to revise this section, because §19.18 pertains to providing status reports on plan implementation, and not providing copies of the plans themselves, which are addressed in §19.14. The comptroller understands the need of the managing agency to have access to the using agency's plan as necessary to complete the compilation and integration of those plans. However, in the interest of reducing paper and publishing costs, the comptroller urges agencies to cooperate in the methods of providing copies of such plan, such as by providing electronic copies. In addition, §19.12(b) requires using agencies to cooperate with managing agencies, and cooperation could involve sharing the periodic status reports with each other, as necessary.

These new sections are adopted under Government Code, §447.002 and §2305.011, which authorize the comptroller and the State Energy Conservation Office to adopt rules relating to energy and water conservation for state buildings and facilities and to the LoanSTAR Revolving Loan Program.

The new sections implement Government Code, §§447.001, 447.002, and 2305.032.

§19.11. Purpose of Rules.

The purpose of the rules that pertain to state facility energy and water management is to achieve all measurable cost effective utility and related operational efficiency improvements, and to reduce unnecessary consumption of natural resources by state agencies and institutions of higher education.

§19.12. Application.

(a) Unless specified otherwise, these rules apply generally to state agencies and institutions of higher education that occupy state-owned buildings or that otherwise incur utility costs.

(b) Responsibilities of state agencies. All state agencies that occupy state-owned buildings are required to develop a Resource Efficiency Plan.

(1) State agencies responsible for provision of utilities. A state agency that is responsible for the provision of utilities that are used in buildings or facilities of other state agencies shall have the primary responsibility for development and implementation of the Resource Efficiency Plan, with the assistance of the using agency.

(2) Using agencies. Any state agency that occupies space in a state-owned building to which a managing state agency provides the utility service shall develop a Resource Efficiency Plan, tailored to the using agency's unique situation. The using agency shall assist and support the managing agency in the preparation and implementation of the managing agency's Resource Efficiency Plan. The using agency shall coordinate its Resource Efficiency Plan with the managing agency. The using agency shall cooperate with SECO and the managing agency to address utility management in the building.

(3) Leased space. A state agency that occupies a building that the state does not own shall develop a Resource Efficiency Plan, tailored to the unique situation of the lessee, and shall cooperate with SECO in addressing the utility management of that leased space. This cooperation shall include taking actions to affect energy and water use and employee behavior to the extent that such actions can result in savings in utility related lease costs. A state agency that occupies non-state owned buildings shall prepare the Utility Awareness Plan that is described in §19.14(c)(5) of this title (relating to Utility Management Planning) and update the plan as required.

(c) Responsibilities of institutions of higher education.

(1) State funded facilities. An institution of higher education that occupies a state-owned building shall develop a Resource Efficiency Plan for its state funded facilities.

(2) Non-state funded (auxiliary) facilities. An institution of higher education may ask SECO for technical guidance to assist any of the institution's auxiliary enterprises in utility management to the extent that the assistance may result in a public benefit.

(3) Leased space. An institution of higher education that occupies a building that the state does not own shall cooperate with SECO in addressing the utility management of the leased space. This cooperation shall include taking actions to affect energy and water use and user behavior to the extent that such actions can result in savings in utility related lease costs. An institution of higher education that occupies non-state owned buildings shall prepare the Utility Awareness Plan that is described in §19.14(c)(5) of this title (relating to Utility Management Planning) and update the plan as required.

§19.13. Definitions.

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

(1) Available funding--Any funds that are appropriated for utility efficiency improvements or related capital upgrades, repairs, maintenance, and operations of utility systems; funds that would ordinarily be allocated to pay for utility expenses; and funding from a financing method that is prescribed by Government Code, §2166.406.

(2) Comprehensive project--All utility related facility and operational improvements which, when considered together, can cost effectively be implemented at one time.

(3) Cost effective measure--Efficiency measures that individually or as a group create measurable and verifiable utility cost savings that are at least as great as their cost within their useful life, not to exceed 15 years.

(4) Five-year Energy Management Plan--A comprehensive plan that consists of a Resource Efficiency Plan and a Long Range Utility Services Plan.

(5) Institution of higher education--Has the meaning that is assigned by Education Code, §61.003.

(6) Managing state agency--A state agency that is responsible for the provision of utilities used in the buildings or facilities of other state agencies.

(7) Preliminary Energy Audit- An overview of facility energy and water use including an examination of utility bills conducted during a walk through of the facility and brief interviews of agency facility personnel designed to identify potential cost effective energy and water conservation measures.

(8) Resource efficiency measure--Any cost effective measure that is designed to reduce utility consumption costs and related operating costs of governmental facilities.

(9) Resource Efficiency Plan--A comprehensive biennial plan that a state agency or institution of higher education prepares and that identifies potential cost effective measures for minimizing utility consumption and costs in all agency facilities and buildings, along with implementation schedules and methods of financing the measures as outlined in this chapter.

(10) Resource Efficiency Plan completion certification document--a document submitted by a state agency or institution of higher education to the State Energy Conservation Office (SECO), in a format specified by SECO, indicating that the agency or institution has completed or updated its Resource Efficiency Plan, and the Plan is available for review by SECO.

(11) State agency--Any department, commission, board, office, or other agency in the executive, judicial, or legislative branch of state government that exists under the constitution or a statute of this state and that has authority that is not limited to a geographical portion of the state.

(12) Using agency--An instrumentality of the state that occupies and uses a state-owned building or facility that another state agency manages.

(13) Utility--Electricity, gas, thermal, or other energy resource, water, and wastewater.

(14) Utility Assessment Report--A detailed assessment of utility and utility related operational efficiency that is prepared by, or under the supervision of, a person who is registered as a professional engineer under the Texas Engineering Practice Act, and which identifies each of the cost effective utility and utility related operational efficiency measures or practices that apply to the buildings or facilities of a state agency or institution of higher education as required by this chapter.

§19.14. Utility Management Planning.

(a) Plan requirement. The head of a state agency or an institution of higher education as outlined in §19.12 of this title (relating to Application) shall ensure preparation of a Resource Efficiency Plan and submit to the State Energy Conservation Office a certification document that the plan has been completed.

(b) Submission date. The Resource Efficiency Plan completion certification document shall be submitted by October 31 of each even numbered year beginning October 31, 2002.

(c) Contents of plan. The Resource Efficiency Plan shall include, at a minimum, the following:

(1) a summary of the overall strategy and goals for addressing utility use at state-owned buildings or facilities;

(2) a Utility Assessment Report (UAR) or a Preliminary Energy Audit (PEA) for a representative number of the state-owned buildings or facilities that the state agency or institution of higher education occupies, and a projected schedule that outlines the plans for completion of a UAR or PEA for all the remaining state-owned buildings or facilities that the agency or institution occupies. The UAR or PEA should detail recommendations for cost effective resource efficiency measures that could be implemented to reduce utility consumption and/or utility costs;

(3) an Implementation Schedule that describes how the agency or institution plans to achieve the agency established goals and implement the recommended cost effective resource efficiency measures that are identified in the UAR or PEA, and a strategy for monitoring the status of implementation of the Resource Efficiency Plan;

(4) a Finance Strategy that describes how the agency or institution plans to obtain funding for the recommended cost effective efficiency measures;

(5) a Utility Awareness Plan through which the agency or institution will educate its personnel on utility conservation methods and practices;

(6) an Asset Management Inventory that describes the agency's or institution's buildings or facilities, in a format that SECO prescribes;

(7) a two-year history of utility use and expenditures for the buildings and facilities that are identified in the Asset Management Inventory, in a format that SECO prescribes, including, without limitation, the rates for utilities that are charged to, and the amount of utilities that are used by, the agency or institution.

(8) a Savings Monitoring and Evaluation Plan that describes the plans for monitoring and evaluating utility efficiency

savings as a result of implementation of the recommendations in the UAR;

(9) a Project Implementation Update that outlines the progress over the previous two years in implementation of the recommendations that are contained in the previous Resource Efficiency Plan, including a summary of the results of the projects in terms of utility efficiency and cost savings;

(10) the name and address of the designated official at the agency or institution who is responsible for implementation of the recommendations in the Resource Efficiency Plan, and the name and address of an agency or institution contact person for the Resource Efficiency Plan;

(11) any Resource Efficiency Plans that using agencies have prepared.

(d) The plan for a using agency or for an agency that leases space shall include only those provisions of subsection (c) of this section that apply to the occupying agency's situation.

(e) After the deadline for completing or updating a Resource Efficiency Plan has passed, SECO may require a state agency or institution of higher education to submit its Resource Efficiency Plan to SECO for review. The Resource Efficiency Plan shall be submitted to SECO within 30 days of receiving a request from SECO to submit the plan.

This agency 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. ENERGY CONSERVATION DESIGN STANDARDS

34 TAC §§19.31 - 19.34

The Comptroller of Public Accounts adopts new §§19.31-19.34, concerning energy and water conservation design standards for state buildings and facilities. Section 19.31 is adopted with changes to the proposed text as published in the February 15, 2002, issue of the *Texas Register* (27 TexReg 1108). Sections 19.32-19.34 are adopted without changes to the proposed text as published in the February 15, 2002, issue of the *Texas Register* (27 TexReg 1108). These new sections are proposed under Texas Administrative Code, Title 34, Part 1, new Chapter 19: State Energy Conservation Office, Subchapter C: Energy and Water Conservation Design Standards, and relate to the functions and responsibilities of the State Energy Conservation Office (SECO), pursuant to House Bill 2914, House Bill 2278, and House Bill 3286, 77th Legislature, 2001.

House Bill 2914, (Acts 2001, 77th Legislature., Chapter 1158, §28), transfers to the comptroller all the functions and activities of the General Services Commission that relate to energy conservation under Government Code, Chapter 447 or Chapter 2305. Government Code, §447.001, establishes the state energy conservation office in the comptroller's office; Government Code, §447.002, directs the state energy conservation office to make rules relating to the adoption and implementation of energy conservation programs applicable to state buildings and facilities; and Government Code, §2305.011, authorizes the comptroller to adopt rules as necessary to administer the programs prescribed by Government Code, Chapter 2305, relating to restitution for oil overcharges. These provisions of House Bill 2914 were effective June 15, 2001.

House Bill 2278, (Acts 2001, 77th Legislature, Chapter 1398, §1), effective September 1, 2001, amends Government Code, Chapter 447 and Chapter 2305, relating to the consolidation and functions of the Energy Management Center and the State Energy Conservation Office and to the transfer of the powers and duties of the center and the office to the comptroller's office.

House Bill 3286, (Acts 2001, 77th Legislature, Chapter 573, §10), effective September 1, 2001, amends Government Code, Chapter 447, to include water conservation along with energy conservation among the duties of the State Energy Conservation Office relating to state buildings and facilities.

New §19.31 specifies the requirement for state agencies and institutions of higher education to use the energy and water conservation design standards that SECO has adopted when constructing new state buildings or conducting major renovations of existing state buildings.

New §19.32 specifies the energy and water conservation design standards. New §19.33 defines a major renovation project. And new §19.34 outlines the requirement for state agencies or institutions of higher education to submit to SECO a copy of the certification by the design architect or engineer that verifies that the construction or renovation complies with the design standards.

The agency received several comments to the proposed rules. Comments were received from the State Energy Conservation Office, the Texas Department of Criminal Justice, the American Society of Heating, Refrigeration and Air-Conditioning Engineers, Inc., York International Corporation, Hellmuth, Obata + Kassabaum, Piazza Engineering Incorporated, MEP Engineering, Inc., HDR Architecture, Inc., ms2 Inc. Consulting Engineers, ACR Engineering, Inc., and WorldCom Telecommunications Corporation.

SECO has requested that §19.31 be revised to provide additional clarification of the applicability of the section. Section 19.31 outlines the requirements to use design standards. Questions have arisen as to when the standards should apply to constructions and renovations that may already be in the preliminary planning stages. In response to these questions, the language has been revised to clarify that the subchapter is applicable to a construction or major renovation where the state agency or institution of higher education has entered into an assignment for design after the effective date of the adopted rules.

Ten comments were received on §19.32(a)(1), relating to Energy and Water Conservation Design Standards. Eight of the comments, from York International Corporation, Hellmuth, Obata + Kassabaum, Piazza Engineering Incorporated, MEP Engineering, Inc., HDR Architecture, Inc., ms2 Inc. Consulting Engineers, ACR Engineering, Inc., and WorldCom Telecommunications Corporation, dealt with how the proposed standards define criteria for chiller selection and all called for modification of the proposed standard. The comments suggested that some of the energy standards promulgated by the American Society

of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) / Illuminating Engineering Society of North America (IESNA), ASHRAE / IESNA Standard 90.1, (hereinafter referred to as the "ASHRAE standards"), should be modified to reflect the latest developments in technology. The commenters specifically stated that the language used in the current ASHRAE standard may prevent the most efficient chillers from being provided on a given project. The comments pointed out that Variable Speed Drive Centrifugal Chillers are more efficient, but would not meet the design kW/Ton (and COP) requirements. The commenters recommend the use of maximum Integrated Part Load Valve/Non-Standard Part Load Valve (IPLV/NPLV) values only. They also recommended the deletion of "Equipment Type" categories for water cooled electrically operated equipment and the substitute of the word "all", and requested that the agency reconfigure the Table in Chapter 6 of the ASHRAE Standard 90.1 based on chiller tonnage categories only rather than compressor type. The remaining two comments, both from The American Society of Heating, Refrigeration and Air-Conditioning Engineers, Inc. pointed out that the ASHRAE Standard 90.1 is a consensus document under continuous review and revision that was produced after "several years of spirited discussion".

The comptroller declines to revise §19.32 in response to the above comments. Any exception, exemption or amendment to the ASHRAE Standard 90.1 would complicate SECO's efforts to verify compliance with the standards. Furthermore, creating exceptions to the standards would also complicate local inspectors' ability to verify code compliance and would require additional training in all areas where this would apply. Further, while the ASHRAE Standard 90.1-1999 may not completely address every issue, this standard does reflect a document that has consensus (as required to meet ANSI requirements) acceptance in the industry. ASHRAE Standard 90.1-1999 is under continuous maintenance by ASHRAE. Therefore, modifications to the ASHRAE standard that are suggested above should be submitted to the ASHRAE standards committee for action. To date there have been more than 30 amendments accepted to the ASHRAE Standard 90.1. Once the suggested modifications have been adopted by ASHRAE / IESNA, the revised standards would automatically become part of the state standards pursuant to §19.32(a)(1), which incorporates the "most current adopted version" of the Energy Standard.

One comment was received from the Texas Department of Criminal Justice for §19.33, Major Renovation Projects, that recommended SECO expand the definition of major renovation project by adding a cost estimate of $25,000 as the base threshold for projects that alter the energy or water use of a facility. The comptroller disagrees that a revision is warranted. Many products, services, or renovations can be obtained for under $25,000, many of which could have an adverse effect on an agency's ability to conserve energy and/or water in the facility. If a renovation will affect the energy or water use of a facility, the renovation should comply with the design standards, to ensure efficiency.

One comment was received on §19.34, from the Texas Department of Criminal Justice suggesting a change in wording that would have inserted the word "file" between "a" and "copy", and noted that the certification to be submitted is one submitted to the agency by the design architect or engineer. No justification for these changes accompanied the comment and the comptroller sees little difference from the originally proposed text. The §19.34, as proposed, allows a state agency or institution to submit a copy of the certification by the design architect or engineer. Therefore, the comptroller has not revised the section in response to the comment.

These new sections are adopted under Government Code, §447.002 and §2305.011, which authorize the comptroller and the State Energy Conservation Office to adopt rules relating to energy and water conservation for state buildings and facilities and to the LoanSTAR Revolving Loan Program.

The new sections implement Government Code, §§447.001, 447.002, and 2305.032.

§19.31. Requirement to Use Design Standards.

(a) Pursuant to Government Code, §447.004, state agencies and institutions of higher education shall use the energy and water conservation design standards that the State Energy Conservation Office (SECO) has adopted under this chapter, when constructing new state buildings or conducting major renovations of existing state buildings.

(b) This subchapter applies to the construction of new state buildings or major renovations of existing state buildings, where the assignment for design has been entered into after the effective date of 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.

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SUBCHAPTER D. LOAN PROGRAM FOR ENERGY RETROFITS

34 TAC §§19.41 - 19.45

The Comptroller of Public Accounts adopts new §§19.41-19.45, concerning the state loan program for energy retrofits, without changes to the proposed text as published in the February 15, 2002, issue of the *Texas Register* (27 TexReg 1109).

These new sections are adopted under Administrative Code, Title 34, Part 1, new Chapter 19: State Energy Conservation Office, Subchapter D: Loan Program For Energy Retrofits, and relate to the functions and responsibilities of the State Energy Conservation Office (SECO), pursuant to House Bill 2914, House Bill 2278, and House Bill 3286, 77th Legislature, 2001.

House Bill 2914, transfers to the comptroller all the functions and activities of the General Services Commission that relate to energy conservation under Government Code, Chapter 447 or Chapter 2305. Government Code, §447.001, establishes the state energy conservation office in the comptroller's office; Government Code, §447.002, directs the state energy conservation office to make rules relating to the adoption and implementation of energy conservation programs applicable to state buildings and facilities; and Government Code, §2305.011, authorizes the

comptroller to adopt rules as necessary to administer the programs prescribed by Government Code, Chapter 2305, relating to restitution for oil overcharges. These provisions of House Bill 2914 were effective June 15, 2001.

House Bill 2278, effective September 1, 2001, amends Government Code, Chapter 447 and Chapter 2305, relating to the consolidation and functions of the Energy Management Center and the State Energy Conservation Office and to the transfer of the powers and duties of the center and the office to the comptroller's office.

House Bill 3286, effective September 1, 2001, amends Government Code, Chapter 447, to include water conservation along with energy conservation among the duties of the State Energy Conservation Office relating to state buildings and facilities.

New §19.41 relates that under Government Code, §2305.032, SECO administers a revolving loan program, called the Texas LoanSTAR (Saving Taxes and Resources) Program for Public Sector Institutions, which provides loans to eligible applicants for energy conservation measures. The current rule for the LoanSTAR program (1 TAC §5.401) will be proposed for repeal after new LoanSTAR rules are adopted pursuant to this rulemaking. New §19.42 contains definitions applicable to the LoanSTAR energy retrofit program; §19.43 outlines the eligibility criteria for projects proposed by loan candidates; §19.44 outlines the application process, application period, and the basis for loan application evaluation; §19.45 describes project funding and repayment requirements, loan payout, loan recipient responsibilities, and title to equipment.

No comments were received regarding adoption of the new sections.

These new sections are adopted under Government Code, §447.002 and §2305.011, which authorize the comptroller and the State Energy Conservation Office to adopt rules relating to energy and water conservation for state buildings and facilities and to the LoanSTAR Revolving Loan Program.

The new sections implement Government Code, §§447.001, 447.002, and 2305.032.

This agency 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 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 3. TEXAS WORKS

SUBCHAPTER WW. TEMPORARY ASSISTANCE FOR NEEDY FAMILIES--STATE PROGRAM

40 TAC §3.7603

The Texas Department of Human Services (DHS) adopts an amendment to §3.7603 with changes to the proposed text published in the March 15, 2002, issue of the *Texas Register* (27 TexReg 1994).

Justification for the amendment is to change the method by which the agency counts child support in a Temporary Assistance for Needy Families-State Program (TANF-SP) case. TANF- SP is funded solely with state dollars. The Office of the Attorney General (OAG) must distribute all collected current monthly court-ordered support directly to the household that receives TANF-SP benefits. Human Resources Code §34.003 requires the TANF-SP rules create a program that is substantially identical to the financial assistance program authorized under Human Resources Code, Chapter 31 (the federally funded TANF program). Since the TANF rules allow a disregard of up to $50 per month of child support, DHS will count the child support as unearned income after disregarding up to $50 per month in TANF-SP.

DHS received two written comments from the Office of the Attorney General and an additional four oral comments at a public hearing on May 22, 2002. A summary of the comments and DHS's responses follow.

Comment: The OAG requested that the proposed rule language in §3.7603(b) be changed to comply with federal distribution rules by inserting the phrase, "collected to fulfill the current month's support obligation," referring to the child support distributed directly to the TANF-SP household.

Response: DHS concurs with this comment and incorporated the change in the adopted rule language.

Comment: The OAG noted that references in proposed §3.7603(b) to 45 CFR Part 232 are obsolete, as the Department of Health and Human Services removed Part 232 in December 1997.

Response: DHS concurs with this comment and incorporated updated references in the adopted rule language.

Comment: A public hearing was held to accept comments on May 22, 2002. Representatives of Texas Welfare Reform, Gray Panthers of Texas, Texas Legal Services, and the Alliance for Human Needs commented on the method used by DHS to count child support in TANF-SP cases. All commentors suggested that exempting all child support from income in the TANF-SP households was the right thing to do. The commentors said that by exempting child support as unearned income when determining benefit levels, TANF-SP families would have a better chance of remaining intact and financially stable, marriages would be strengthened, and policy would be simplified.

One commentor said the bond between the child to whom the support is owed and the parent who owes the support is strongest when the obligor knows that the child support is improving the economic circumstances of the child, dollar for dollar. The bond is weakest when the child support displaces other funds available for the child and when there is not a dollar-for- dollar improvement in the child's economic circumstances.

One commentor said that DHS has no information that excluding all child support in calculating the TANF-SP benefit will lead to sham marriages or to marriages for any but legitimate reasons, and that DHS has no information that there will be a fiscal impact to disregarding all child support in TANF-SP cases.

Response: While DHS appreciates the comments received during the public hearing, the adopted rules concerning the method for counting child support in TANF-SP cases are aligned with language prescribed in the Human Resources Code, Title 2, §34.003(b), which states: "The rules must be designed to result in a state program that is substantially identical to the financial assistance program authorized by Chapter 31, except to the extent that programmatic differences are appropriate because of the populations served by those programs and the sources of funding for those programs." Chapter 31 calls for the first $50 of child support to be disregarded as income, and thus the TANF-SP rules must follow that same format in order to remain substantially identical to TANF. Therefore, DHS made no change to the proposed text regarding the amount of child support to be disregarded.

The amendment is adopted under the Human Resources Code, Title 2, Chapter 34, which authorizes DHS to administer a state temporary assistance and support services program.

The amendment implements the Human Resources Code, §§34.001-34.007.

§3.7603. Eligibility.

(a) Requirements. To be eligible for services under the Temporary Assistance for Needy Families-State Program (TANF-SP), the family must meet the requirements of this subchapter and the TANF requirements for applicants specified in this chapter.

(b) TANF-SP Child Support Requirements. The Texas Department of Human Services (DHS) adheres to the requirements and procedures stated in 45 Code of Federal Regulations, §§235.70, 264.30, 302.31, and 302.32, with the following exceptions related to penalties for noncompliance and the retaining of child support. In regard to recipients subject to the requirements specified in §3.301(d) of this title (relating to Responsibilities of Clients and the Texas Department of Human Services (DHS)), DHS applies a noncompliance penalty as specified in §3.301(d)(5)(A) of this title (relating to Responsibilities of Clients and the Texas Department of Human Services (DHS)). The Office of the Attorney General will distribute child support collected to fulfill the current month's support obligation directly to the TANF-SP household. DHS will budget the child support as unearned income and disregard up to $50 per household.

This agency 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 July 23, 2002.

TRD-200204538
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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Proposal publication date: March 15, 2002
For further information, please call: (512) 438-3734

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 21. RIGHT OF WAY

The Texas Department of Transportation (department) adopts the repeal of §§21.600-21.606, and simultaneously adopts new §§21.600-21.606, concerning leasing of highway assets. The sections are adopted without changes to the proposed text as published in the May 10, 2002, issue of the *Texas Register* (27 TexReg 3985) and will not be republished.

EXPLANATION OF ADOPTED REPEALS AND NEW SECTIONS

Transportation Code, Chapter 202, Subchapter C, authorizes the department to lease a highway asset, part of a right of way, or airspace above or underground space below a highway that is a part of the state highway system if the department determines that the interest to be leased will not be needed for a highway purpose during the term of the lease.

Due to amendments in state and federal statutes and regulations, it is necessary to adopt the repeals and new sections. These amended laws caused various parts of the existing rules relating to leasing of highway properties to be inconsistent with current statutes and regulations.

The Texas Transportation Commission (commission) last adopted rules relating to leasing of highway assets in 1988. Since that time, there have been numerous changes in the organization of the department and in the titles of its employees. The new rules are revised to reflect the department's current organization and titles. The rules simplify the structure, clarify the meaning, and establish a more efficient procedure for the leasing process. Throughout the rules, the term for highway asset has been broaden to reflect current law. It expands the category of department property available for lease from "highway right of way" (as previously described in the rules) to "highway asset," defined by Transportation Code, §202.051, as "an interest in real property that is held or controlled by the department for a highway or department purpose."

New §21.600 is based on former §21.600. This section describes the purpose of the subchapter.

New §21.601 is based on former §21.601. The definitions of commission, department, director, district, and executive director are updated to reflect current terminology. The definition of highway asset is added to utilize a more efficient procedure for execution of a lease and to comply with the statutory amendment to Transportation Code, §202.051, which expanded the definition of highway assets available for a lease.

New §21.602 is based on former §21.602. Section 21.602 outlines the findings of the commission to authorize the lease of a highway asset. This section further allows the director of the Right of Way Division to authorize short-term leases of not more than two years, in lieu of requiring commission approval, provided that the director makes the same findings otherwise required by the commission. The change in procedure for short-term leases will allow the department to be more efficient and responsive to match the needs of private investment and maximize the generation of revenue from existing assets of the department.

New §21.603 is based on former §21.603. This section describes the procedures of awarding leases on a sealed bid basis.

Prior to award of lease, notice will be published once a week for three consecutive weeks in the county in which the asset is located. In order to make the rules consistent with Transportation Code, §202.052, the new section further adds a description of conditions under which the commission can waive the requirement for payment of fair market value.

New §21.604 is based on former §21.604. The section transfers responsibility for supervising, authorizing, and executing the form and content of leases from the "deputy director" to the director of the Right of Way Division. This will improve the efficiency of procedures relating to the sale and exchange of surplus property interests. The new section also clarifies that it is the district engineer who supervises compliance with lease provisions and authorizes remedial action described in paragraphs (7), (11), (15), (16), and (17) of this section. This places decision making at the level closest to the problem. Finally, paragraph (14) more precisely describes the requirement for lessee liability insurance and paragraph (18) incorporates the statutory exception which permits lessees to grant security interests in their leasehold interests. This change is required to bring the current rule into compliance with Transportation Code, §202.053.

New §21.605 is based on former §21.605. Section 21.605 describes the use requirements of highway right of way. The new section streamlines the process by limiting the Federal Highway Administration approval to those assets in which there was federal participation and improves safety by broadening the purposes for which the department can deem lessee use to be a hazard. It also clarifies that lessee use of all signs on the leased premises are subject to approval by the district engineer.

New §21.606 is based on former §21.606. Section 21.606 describes the procedures and information necessary for submitting a written request to the district engineer for leasing a highway asset. After all information is verified by the district engineer, the district engineer will forward the request to the Right of Way Division for processing and further handling.

COMMENTS

No comments were received on the proposed repeal and new sections.

SUBCHAPTER L. LEASING OF HIGHWAY RIGHT OF WAY

43 TAC §§21.600 - 21.606

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

This agency 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 July 26, 2002.

TRD-200204631
Richard D. Monroe
General Counsel
Texas Department of Transportation
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Proposal publication date: May 10, 2002
For further information, please call: (512) 463-8630

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SUBCHAPTER L. LEASING OF HIGHWAY ASSETS

43 TAC §§21.600 - 21.606

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

This agency 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 27. TOLL PROJECTS

SUBCHAPTER E. FINANCIAL ASSISTANCE FOR TOLL FACILITIES

43 TAC §§27.50 - 27.58

The Texas Department of Transportation (department) adopts new §§27.50-27.58, concerning financial assistance for toll facilities. Sections 27.51-27.58 are adopted with changes to the proposed text as published in the February 15, 2002, issue of *Texas Register* (27 TexReg 1150). Section 27.50 is adopted without changes and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

Transportation Code, §222.103 authorizes the department to participate, by grant or by loan, in the cost of the acquisition, construction, maintenance, or operation of a toll facility of a public or private entity. Sections 27.50-27.58 prescribe the policies and procedures by which the department will participate in the financing of a toll facility that is not under the jurisdiction of the department.

New §27.50 states the purpose of the new subchapter, which is to prescribe the policies and procedures by which the department will participate in the financing of a toll facility that is not under the jurisdiction of the department.

New §27.51 defines words and terms used in the new subchapter. The term "executive director" is defined to include the department's executive director or the executive director's designee. This definition allows the executive director to delegate some duties so that the rules may be efficiently implemented.

New §27.52 describes the purposes for which the commission may loan or grant funds under this subchapter. The department's statutory authority allows it to provide financial assistance for the acquisition, construction, maintenance, and operation of a toll facility. Section 27.52 provides that the commission may loan or

grant funds for those purposes, as well as clarifying that the development of a project requires the preparation of project plans, specifications, and engineer's estimate, right of way acquisition and utility relocation, and necessary or incidental administrative, legal, and other expenses.

New §27.53 prescribes procedures for submitting a request for financing and the information that must be included with a request. Pursuant to Transportation Code, §222.103, any public or private entity that is authorized by state law to construct or maintain a toll facility is eligible to submit a request. In accordance with §222.103, a private entity is not eligible to submit a request for a grant.

In order to provide the commission with the ability to make an informed decision concerning the most efficient use of the limited available funds, a requestor must submit basic information as part of a request that describes the project to be financed and the requested financial assistance. The commission recognizes that it must act as proper steward of its limited funding and ensure that those funds are used on projects that benefit mobility and the state's transportation system. The commission also recognizes that a toll facility will not be successful without adequate support from users of the facility and assurances that the project will be completed and operational. Before committing funding toward a toll facility, the commission feels it must consider these critical issues and be aware of any controversies associated with a project. The commission further recognizes that certain information required by this section will not be available if a request only asks for funding for costs associated with the development of a toll facility before all environmental clearances required to commence construction of the facility have been obtained.

Information provided with the basic request must include a description of the need for the project and its potential impact on traffic congestion and mobility, the proposed use of the requested financial assistance and a list of all funding sources proposed for the project, the requested financing terms if loan financing is requested, potential changes to the state highway system necessitated by the project, and information, to the extent then available, regarding community support for the project. Consistent with the department's vision for environmentally sensitive transportation systems and to ensure compliance with state and federal requirements, a request must be accompanied by a binding commitment that the proposed project will comply with all applicable environmental requirements.

Supplemental information and data are also required to provide information regarding financial feasibility and project impacts. The commission has an obligation as the steward of public funds to view data concerning the project's financial feasibility and to ensure the project is a wise use of scarce funding, is consistent with applicable transportation plans and programs, and that loan financing will be repaid. Information regarding financial feasibility is not required if a request only asks for funding for costs associated with the development of a toll facility before all environmental clearances required to commence construction of the facility have been obtained. Another exception is provided to avoid unduly burdening applicants with new study requirements when the information is not relevant, the department already possesses the required information, or the past performance of the requestor on previous projects indicates that the requestor will adequately and prudently address the issues and impacts described in the requested information or data.

New §27.54 provides for a two step approval process for a loan or grant. In order to make the most efficient use of the limited available funds, to leverage the use of other funds on projects, to ensure that financial assistance benefits the state's transportation system, and to act as a proper steward of state funds, §27.54 prescribes criteria considered by the commission prior to granting preliminary approval of financial assistance, actions that must take place before final approval, and findings and determinations that must be made by the commission before granting preliminary or final approval. The commission will consider the need for the project and its anticipated benefit, availability of funding, and the percentage of total project cost represented by the requested financial assistance. To have some assurance that a project is consistent with the department's vision for environmentally sensitive transportation systems and that the project will be successful, the commission will consider the potential impacts of a project and evidence of local public support.

Under 23 C.F.R. §450.216 and §450.324, in order for a project to receive federal highway funding it must be included in a federally approved Statewide Transportation Improvement Program (STIP) and financially constrained transportation improvement program (TIP). Moreover, regionally significant transportation projects for which Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval is required must be included in the STIP and TIP whether the project is funded with federal, state, local, or private funding. Projects included in the STIP must be derived from the statewide transportation plan. Similarly, projects included in a metropolitan TIP developed by the metropolitan planning organization must be derived from a metropolitan transportation plan. Projects included in a rural TIP must be consistent with the statewide transportation plan. Projects in nonattainment areas included in the STIP and TIP must conform to the State Implementation Plan.

In accordance with the department's vision for environmentally sensitive transportation systems and to ensure compliance with state and federal requirements, prior to receiving final approval for the loan or grant of funds, the requestor must complete a study of the social, economical, and environmental impacts of a project consistent with the spirit and intent of federal and state environmental laws and regulations. In order to ensure that financial assistance is only provided to a project that will be successful and that any loan financing will be repaid, the requestor must obtain an investment grade traffic and revenue report for the project. The executive director may waive one or both of these requirements if the director determines that the study or the report is inapplicable or unnecessary due to the nature of the requested assistance. For instance, if a requestor seeks financial assistance for preliminary studies, it would be too early in the project development process to complete an environmental study and prepare an investment grade traffic and revenue report.

New §27.55 provides that the executive director will negotiate the terms of financial assistance agreements necessary to protect public safety and to prudently provide for the protection of public funds. In order to ensure federal requirements are met and to avoid jeopardizing federal reimbursements of highway funds, the requestor must comply with applicable law and the department may require that the requestor seek any necessary federal approval or concurrence through the department. Upon request and, to the extent applicable and permitted by federal law, after reasonable advance notice and opportunity to cure, the requestor is obligated to reimburse the department for any federal funds that are applied by the requestor to pay costs not incurred in conformity with applicable state and federal law.

A primary purpose of department financial participation is to accelerate the funding and building of toll facilities by leveraging other sources of project funds, particularly bond proceeds. In order to issue bonds for a project, a requestor is required to comply with various terms and conditions in the trust agreement or indenture securing the bonds or in other financing documents. These terms and conditions include provisions relating to project accounting and audits. These provisions generally require an issuer to maintain its books and records in accordance with generally accepted accounting principles (GAAP) and to have an audit of those books and records performed annually in accordance with generally accepted auditing standards. The issuer is also required to report detailed financial information and audits and to disclose other information to institutions required by federal laws and regulations and relied upon by investors to protect their investment in a project.

Section 27.55 prescribes requirements a requestor must follow in maintaining its books and records, with exceptions as required by existing bond indentures applicable to the project or that have been historically implemented and found acceptable to the public debt markets, required audits of those books and records, and requirements relating to the retention of audit work papers and reports and original project files, records, and other documents. The purpose of these requirements is to ensure that financial participation provided by the department is used for the purpose for which it is loaned or granted, to protect the taxpayer's and the state's interests, to ensure applicable laws and regulations are followed, and to facilitate a requestor's development and operation of projects.

New §27.56 establishes the requirements for the design and construction of projects undertaken by a public or private entity with financial assistance provided by the department. Transportation Code, §201.103, requires the commission to plan and make policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads. Transportation Code, §203.002, authorizes the commission to lay out, construct, maintain, and operate a modern state highway system. Moreover, since a requestor may require the use of federal highway funds, the commission notes that Transportation Code, §221.003, provides that an improvement of the state highway system with federal aid shall be made under the exclusive and direct control of the department, and Transportation Code, §222.031, provides that money appropriated by the United States for public road construction in this state may be spent only by and under the supervision of the department. The department is required to ensure that all applicable federal and state laws, regulations, standards, and specifications are complied with in the use of those funds. Notably, 23 C.F.R. §1.9 prohibits the use of Federal-aid funds for any cost that is not incurred in conformity with applicable Federal and State law, the regulations in that title, and policies and procedures prescribed by the Federal Highway Administrator.

The commission therefore believes that it has a responsibility to adopt rules that promote: (1) the construction, maintenance, and operation of safe and effective turnpikes, (2) the effective use of revenue that maximizes benefit to the traveling public, and (3) compliance with applicable state and federal laws, regulations, and policies. The conditions placed on performance of project development activities are necessary in order to ensure that the requestor complies with all applicable federal and state laws, regulations, standards, and specifications.

To clearly assign responsibility for projects developed by the requestor, §27.56(a) states that the requestor is fully responsible for each project it undertakes.

Section 27.56(b) describes the design criteria required for project development. Since these projects utilize state and federal funding, pursuant to 23 C.F.R. Part 625, this subsection requires that projects be developed in compliance with either the department's established design manuals or criteria published by the American Association of State Highway and Transportation Officials. Recognizing that there may be situations when the use of alternative accepted criteria would be beneficial to the project, provisions are included to identify when the department may approve the use of alternative criteria. This approval may be granted only after determining that the particular criteria could not reasonably be met due to physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution. This process is similar to that used by the department and other states to minimize the risk of tort liability and to ensure that deviations from design criteria are well documented and are not made arbitrarily.

Section 27.56(c) describes the project development requirements for projects developed by the requestor. In accordance with 23 U.S.C. §111, the state will not add any points of access to or exit from an interstate highway without the prior approval of the FHWA. Therefore, §27.56(c)(1) requires that the requestor submit to the department all materials required to seek FHWA approval of any proposal to revise access to an interstate highway.

Section 27.56(c)(2) describes the requirement for the requestor to submit preliminary designs to the department for review and approval. As part of the department's oversight of projects developed by a requestor, the department must ensure that any project utilizing state or federal highway funds is developed in accordance with all applicable federal and state laws and regulations and that the appropriate design criteria are being properly utilized. It is beneficial to all parties to determine any potential areas of non-compliance as early in project development as possible so that agreement can be reached on any necessary design changes. If these issues are not discovered until all detailed design work has been completed, then any required changes will delay the project. The 30% phase of design development is commonly regarded as the point at which schematic design is complete. At this point, the basic geometry of the facility has been determined and the items listed for submission to the department should be available for review. The specific procedures for preliminary design submission and approval will be set out in the financial assistance agreement.

The Design Summary Report form is used by the department at the beginning of project development to facilitate agreement among all parties on the design standards and some basic values to be used for the design of the project. Submission of this form will enable the department to verify that the basic design parameters used for the project are appropriate. A design schematic depicting plan, profile, and superelevation is needed for the department to verify that the curvature and pavement cross slope provided are appropriate for the design speed and class of highway. Typical sections are required to enable department review of the facility's proposed cross section for the entire right of way width.

Structural (bridge, retaining, and sound wall) layouts are required for the department to ensure the provision of adequate foundations, crashworthy railing, and necessary horizontal and vertical clearances to adjacent features. Structural capacity information is also required to ensure that the proposed structures will safely handle the loadings that can be anticipated on the facility. Drainage area maps and hydraulic studies will enable department review of drainage throughout the project.

An explanation of anticipated methods to handle traffic during construction is required to ensure the safety of the traveling public by providing appropriate traffic carrying capacity and detours as necessary. A discussion of how U. S. Army Corps of Engineers and water quality certification requirements are to be met will ensure that these important legal requirements are addressed early in project design and will provide an opportunity for the requestor to benefit from the department's experience in this area. Submission of a signing schematic will ensure that the project design is compatible with the appropriate placement of guide signs that comply with the Texas Manual on Uniform Traffic Control Devices.

Section 27.56(c)(3) describes the requirements pertaining to the construction specifications applicable to a project. To provide a quality project and to ensure the best use of limited state and federal highway funding, requestors are required to use the department's specifications on their projects. These specifications have been proven over time to provide high quality and durable facilities. In addition, highway construction contractors across the state are familiar with department specifications, resulting in economic savings to the requestor. However, if a requestor asks to use an alternative specification for a particular item of work, the executive director may approve the request if the proposed specification ensures the quality and durability of the finished product while protecting the safety of the traveling public. In deciding whether to approve the use of an alternative specification, the executive director will consider whether the project is intended to become part of the state highway system.

Section 27.56(c)(4) describes the requirements for department approval of the final plans and contract administration procedures. As part of the department's oversight of projects developed by a requestor, the department must ensure that any project utilizing state or federal highway funds is developed in accordance with all applicable federal and state laws and regulations and that the appropriate design criteria are being properly utilized. The requestor is required to submit the final plans, specifications, and engineer's estimate (PS&E) to enable the department to verify that the PS&E comply with applicable state and federal regulations and that the appropriate design criteria are met. The requestor is required to summarize any design changes made since approval of the preliminary design so the department can readily determine that the alterations comply with the established design criteria for the project. The department will also review the bidding proposal and contract administration procedures submitted by the requestor to ensure compliance with applicable state and federal requirements. The department will also ensure that the requestor has addressed in the PS&E all environmental permits, issues, commitments, or mitigation required by the approved environmental document.

To ensure that a requestor does not construct a project while utilizing insufficient design criteria or inadequate traffic control provisions, §27.56(c)(5) requires the PS&E to be approved by the department before the project is advertised for bids. The department will ensure that requestor procedures related to bidder qualification, bidding, award, and execution of a contract are in compliance with applicable federal and state requirements.

Section 27.56(c)(6) describes the requestor's responsibility to oversee the construction of the project and ensure that construction is performed in compliance with state and federal requirements.

Section 27.56(c)(7) describes the requirement for contract revisions to comply with the appropriate design criteria applicable to the project and requires the requestor to submit contract revisions to the department. Any revision that affects prior environmental approvals or significantly revises the project scope or the geometric design must be submitted to the executive director for approval before beginning the work. This requirement will protect the safety of the traveling public by ensuring that a non-conforming design change is not implemented as a contract revision.

Section 27.56(c)(8) requires the requestor to provide the department with a final set of as-built plans that has been signed, sealed, and dated by a professional engineer certifying that the project was constructed in accordance with these plans. This submission is necessary for the department to have a final record of as-built plans for all projects constructed with state or federal funds. These plans are often needed by the department for future reference for a variety of purposes.

Section 27.56(c)(9) describes the requirements for the requestor to provide the department, if available, with copies of the electronic documents developed by the requestor. Since these facilities may revert to the department in the future, it is beneficial to the department to have this information for possible future use in work on these facilities.

Section 27.56(c)(10) describes the responsibility of the requestor to comply with all applicable laws with respect to its projects.

To protect the safety of the traveling public, §27.56(c)(11) requires the requestor to obtain express written agreement from the department before performing any work within the limits of state owned right of way.

Since toll facilities financed by the department may revert to the department's jurisdiction and become part of the state highway system, and to ensure that these facilities comply with applicable federal and state requirements, §27.57 provides that a requestor may be required to use certain specific standards and procedures in maintenance of a project. In establishing those standards and procedures, if any, or in considering exceptions, the department will consider the requestor's past experience with similar projects and whether the project is intended to become part of the state highway system.

In order to protect the taxpayer's and the state's interests, to act as a proper steward of state funds, and to ensure the repayment of loan financing, the commission in §27.58 requires a requestor receiving a loan to agree to provide collateral and security for repayment of the financial assistance and completion of the project, or other protections as the executive director deems necessary; to repay the financial assistance according to a prescribed repayment schedule; to submit certain financial and operating reports; and to abide by default provisions.

The financial and operating reports required to be submitted to the department are the same reports a requestor is required to submit in order to comply with various terms and conditions in the trust agreement or indenture securing the bonds or in other financing documents. A primary purpose of department financial

participation is to leverage other sources of project funds, particularly bond proceeds, allowing toll facilities to be funded and built more quickly. In the trust agreement or indenture or other financing document, a requestor is required to report detailed financial information and to disclose certain other information to institutions as required by federal laws and regulations and relied upon by investors to protect their investment in a project.

In order to ensure that financial participation provided by the department is used for the purpose for which it is loaned or granted, to ensure applicable laws and regulations are followed, and to facilitate a requestor's development and operation of projects, §27.58 prescribes requirements a requestor must follow in submitting financial and operating reports to the department.

COMMENTS - Public Hearing

A public hearing was held on February 27, 2002 to receive comments concerning the proposed adoption of §§27.50-27.58. Jerry Hiebert, Executive Director of the North Texas Tollway Authority (NTTA), led an NTTA delegation that was opposed to the proposed rules. Mr. Hiebert and Jack Miller, a member of the NTTA board of directors, provided comments on behalf of NTTA. Also presenting comments was Kevin Evans, representing the Ports-to-Plains Trade Corridor, who was also against the proposed rules.

Comment: Mr. Hiebert made a number of general comments concerning the proposed rules. NTTA feels, as an operating toll agency, that the draft rules are generally unworkable as they request materials that are impossible to generate at the time in the process that the department and the rules seek those materials, and that are unavailable at the time that an agency would submit a preliminary request. Mr. Hiebert also asserted that the rules contain features that make projects incapable of being financed in the public debt markets, such as the required indemnities and the extensive oversight and approval rights retained by the department. Mr. Hiebert also stated that the rules are incompatible with the actual turnpike development process. For example, the proposed rules require that accounting be done on a cash basis when typically toll authorities do accounting on an accrual basis, and prescribe record keeping requirements that are inconsistent with the requirements of their trust agreements, and that deviate from the standards and principles established in past agreements with the department. If the rules were followed as proposed, it would be unlikely that anyone would be able to qualify for financial assistance and secure debt financing in the private marketplace.

Mr. Hiebert also stated that the rules propose an undesirable one size fits all approach. The rules are very rigid and mandatory, offering little opportunity for the strengths and weaknesses of a particular project or requestor to be considered in the approval, documentation, or oversight of a loan or grant. There is no authority to consider the experience or past performance of the requestor as factors for issuance of a waiver of or variance from rule requirements. The experienced toll authorities, such as NTTA or Harris County Toll Road Authority, are subject to the same requirements as brand new, inexperienced toll authorities. NTTA's experience and track record should allow them to be considered in a different light than a startup facility where there are many more unknowns. The rules would also fundamentally change the way the department and NTTA have done business in the past, preclude past arrangements, and form a disincentive for regional toll authorities to partner and cooperate with the department on joint facilities.

Mr. Hiebert also commented that the rules omit the most important and relevant evaluation factors of a turnpike project, and do not appear to permit the commission and the department to consider the factors most relevant to the decisions those entities must make. For example, the potential maintenance savings as a result of construction of a project by a regional tollway authority or regional mobility authority, the experience and capability of a requestor to complete a project, the requestor's past performance and track record with the commission or the requestor's use of financial assistance, both positive and negative, and the borrower's credit and business history. Extensive design and maintenance requirements are proposed, but the issue of whether the department will ever operate the roadway is not a factor to be considered. The rules also do not appear to permit a requestor's past performance, whether satisfactory or unsatisfactory, to be considered when assistance is sought again in the future.

Mr. Hiebert finally states that portions of the rules are incompatible with the stated purpose of the statute. The intent of Senate Bill 342 was to leverage both the department's funds and its resources by allowing toll projects to be developed by toll authorities. The draft rules permit very little project development to take place independent and outside of the department. The executive director is authorized to negotiate essentially all aspects of a project's design. The rules place all of the responsibility for the project on the requestor but allow it very little authority to make decisions. NTTA finally questions, given the need of a turnpike authority to move quickly to be responsive to the market, whether the department has the resources to perform these extensive oversight functions in a timely manner consistent with how the toll authorities need to operate.

Response: The department will respond to these comments in detail in its response to written comments. The department agrees that the proposed rules should be revised to make them workable for both the department and the toll authorities which the Legislature has authorized the department to work with in maximizing the effectiveness of resources available to address current and future mobility needs. Subsequent to the date of the hearing, the department engaged in an ongoing dialogue with NTTA to develop workable rules. The rules are intended to facilitate debt financing of a requestor's projects, to provide flexibility in considering requests for financing, including consideration of a requestor's experience and past performance in appropriate circumstances. The final rules increase local control and decrease department involvement, while retaining a degree of department involvement necessary to comply with applicable law and ensure public safety and accountability, and are intended to ensure that department oversight is carried out in a timely manner.

Comment: Jack Miller, NTTA, stated that he became an advocate for TEX-21, which worked closely with the House and Senate and with the commission in the passage of Proposition 15 and Senate Bill 342 in order to leverage the scarce funds we have to provide for infrastructure in the state. He's convinced that tollways are an important part of the future of transportation in order to meet our mobility needs, and is concerned, as was also expressed by Jerry Hiebert, that the proposed rules don't really provide the means and tools to accomplish the purposes of Senate Bill 342 and Proposition 15.

Response: The department agrees with the principle that toll facilities are an important tool in meeting mobility needs. As previously stated, the department has been involved in a dialogue

with NTTA to develop workable rules that are consistent with the purposes of Senate Bill 342 and Proposition 15.

Comment: Kevin Evans, Ports-to-Plains Trade Corridor, commented that he is an active supporter of Proposition 15 and became concerned when reading the proposed rules that they would tie those who could consider this option with the department. He advocated allowing requestors to have more autonomy, and to simplify the rules and streamline the process. He suggested that there should be an opportunity to pursue design build or other opportunities that might be available to private sector or governmental entities in their efforts to construct toll roads.

Response: As previously described, the final rules increase local control and decrease department involvement, while retaining a degree of department involvement necessary to comply with applicable law and ensure public safety and accountability. In doing so, the requirements of the rules have been streamlined. The rules do not prevent a requestor from utilizing design build or other opportunities to construct toll facilities to the extent authorized by law.

COMMENTS - Written

The North Texas Tollway Authority (NTTA) and Koch Performance Roads, Inc. (Koch) offered written comments on the proposed rules. Both entities were opposed to the rules as proposed.

Comment: NTTA stated that the last sentence of §27.50 limits these rules to non-TxDOT toll projects, and questions whether this provision is consistent with Senate Bill 342, which states that it applies to any participation by the department in the cost of a project under Transportation Code, Chapter 284, 361, or 366. TxDOT's participation in the projects of its own turnpike division is under Chapter 361. NTTA questioned whether the rules shouldn't also apply to TxDOT toll projects.

Response: The department disagrees with the proposition that the rules also apply to department toll projects. The Administrative Procedure Act, in Government Code, Chapter 2001, does not require a state agency to adopt rules relating to the internal management of the agency, including rules describing how the department will manage providing funding for its own turnpike projects.

Comment: NTTA requested that the definition of metropolitan planning organization (MPO) in §27.51 provide that an MPO is established under 23 U.S.C. § 134, "or any successor statute thereto."

Response: The definition is accurate and the department therefore does not agree that changes to the rules are necessary.

Comment: NTTA requested that §27.52 be amended to provide that the commission may also loan or grant funds for purposes relating to the acquisition and construction of a toll facility. The two added words are from Senate Bill 342.

Response: The department agrees with this comment. The change has been made.

Comment: NTTA also commented that the permitted uses of financial assistance are too narrow when considered in light of customary development costs, and requested that the rules provide that the commission may loan or grant funds for financing costs, and for necessary or incidental administrative, legal, and other expenses.

Response: The department disagrees in part with this comment. Funds constitutionally dedicated under Article VIII, Sections 7-a and 7-b, Texas Constitution, cannot be used for the payment of financing costs (see Op. Tex. Att'y Gen. No. JC-0353 (2001)). The other requested change has been made. The department has also revised §27.52 to provide that financial assistance can be used for the preparation of project plans, specifications, and engineer's estimate, rather than necessary studies and preliminary engineering, which are covered in a new definition for development costs. Section 27.52 has also been revised to clarify that financial assistance can be used for the costs of utility relocation.

Comment: NTTA commented that, with regard to the information required to be contained in a request for financing under §27.53, there should be different standards for requests for development costs. Some requested information does not exist at this stage of project development, such as the estimated total cost of the project, the need for the project, the location of all right of way, facilities, and equipment required to make the project functional, revisions or changes to state highway system facilities necessitated by the project, and documentary evidence of community involvement in the development of the proposed project and public opinion about it.

Response: The department agrees with this comment. A definition of development costs, developed in consultation with NTTA, has been added to §27.51 to provide that those costs associated with the development of a toll facility before all environmental clearances required to commence construction of the facility have been obtained may be treated differently in a request for financing. Changes to the rules requested by NTTA if the request is to fund only development costs have been made.

Comment: NTTA also commented that the requirement in §27.53 for a statement of the amount of unencumbered or unreserved cash on hand is largely irrelevant to the feasibility analysis, and that a bond rating as required by §27.53 is unavailable for financing until the TxDOT's assistance is committed, and requested changes to the rules to resolve these concerns.

Response: The department agrees with this comment. The requested changes have been made.

Comment: NTTA commented that the preamble for the proposed rules states that its purpose is to require the requestor to comply with the terms and conditions in trust agreements or indentures securing the bonds or on other financing documents, but that, based on their experience, the proposed rules are at odds with customary practices, thereby whipsawing the requestor between the market's and TxDOT's requirements. Trust agreements require the use of accrual basis accounting for the required reports to investors. Complying with the cash basis requirement in §27.53 would cause significant confusion, invite criticism from rating agency and investor analysts, and be costly, burdensome, and time consuming.

Response: The intent was not to require the use of cash basis instead of accrual basis accounting, thereby imposing duplicative, disjunctive requirements, but to require annual cash flow tables that the department understands are prepared on a cash basis. The department has made changes to the rules that were requested by NTTA and other changes in order to clarify that cash basis accounting is not required, including requiring a pro forma annual cash flow analysis for the expected financing period of the project.

Comment: With regard to the requirement that a financial feasibility study provided by a requestor under §27.53 include anticipated interest rates applicable during the term of the financial assistance, NTTA asks "which interest rates?" NTTA also asks if the requestor is being asked to assume an interest rate on the TxDOT loan, or on the bond or other financing, and presumes that the TxDOT loan would not have multiple series, dates of maturity, and interest rates. NTTA also asks what is meant by interest rate subsidies.

Response: The department has revised the rules to provide that the anticipated interest rates requested are those for any and all debt outstanding during the term of the financial assistance. The intent is to obtain sufficient information to determine if a requestor will have sufficient funds to provide debt service on all of its debt obligations, including the requested financial assistance, during the expected financing period. Other rule changes have been made to carry out this intent. The provision relating to interest rate subsidies has been deleted.

Comment: NTTA commented that §27.53(c)(1)(I) might be viewed as barring assistance unless all factors contained in clauses (i)-(iv) are present. Highly worthwhile projects may not, for example, maximize private and local participation, but still deserve support.

Response: Assistance is not barred if all four factors are not present. These are factors the commission will consider in ranking projects for purposes of providing financial assistance. The rules have been amended to clarify this intent.

Comment: Regarding §27.53(c)(2)(C), NTTA commented that it is essential that TxDOT not require an environmental assessment or environmental impact statement at this stage because none will be available, and suggested alternative rule language.

Response: The department agrees with this comment and has made the requested change to the rules.

Comment: NTTA states that, in their view, one of the most troubling features of the proposed rules is their disregard for the requestor's past performance and experience in determining whether approvals, waivers or exceptions are appropriate and the degree of oversight. NTTA requests that the rules allow the commission to consider NTTA's experience in the toll field and their track record in completing successful turnpike projects. The same rationale applies to the Harris County Toll Road Authority (HCTRA). NTTA requested that §27.53(d) be amended to allow the past performance of the requestor and the commission's experience and course of dealing with the requestor to be considered when determining whether to waive required information or data in a request for financing.

Response: The department generally agrees with these comments. A change to §27.53(d) has been made to allow the past performance of the requestor on previous projects developed in collaboration with the department to be considered. Section 27.54(a)(1) has also been amended to provide that the commission will consider the requestor's experience and past performance in similar projects when determining whether to grant preliminary approval of a project.

Comment: NTTA commented that, based on the legislative history of Senate Bill 342, Proposition 15, and the NTTA's enabling legislation, NTTA's requested change to §27.54(a)(1)(A), providing that in considering the transportation need for and anticipated public benefit of a project, the commission will consider factors such as the project's potential ability to accelerate needed transportation facilities or to reduce financial and other burdens on the commission and the department, lists factors essential to this evaluation.

Response: The department agrees with this comment and has made the requested change.

Comment: Regarding §27.54(a)(3) of the proposed rules, which provided that by granting preliminary approval the commission authorizes the executive director to negotiate certain provisions relating to the project and the requested financial assistance, the NTTA commented that the word negotiate sends the wrong signal with respect to matters relating to a project's limits, scope, definition, and design. The project should remain the requestor's project. Authorizing the executive director to negotiate every salient feature of the project seems to undermine the whole purpose and utility of NTTA, HCTRA, regional mobility authorities (RMA), and other independent toll authorities by implying that the commission intends for the project development process to be brought in house to TxDOT if financial assistance is sought.

Response: The department agrees with the principle that a project should remain the requestor's project and that having complete department control of the project development process would undermine the utility of toll authorities and may undermine the financing of a project. As previously described, the final rules increase local control and decrease department involvement, while retaining a degree of department involvement necessary to comply with applicable law and ensure public safety and accountability. The requested changes to §27.54(a)(3) have been made.

Comment: NTTA commented that the degree of department oversight should be informed by the past performance of the requestor. A stated purpose for authorizing RMAs and regional tollway authorities such as NTTA was to maximize and extend TxDOT's resources. The NTTA's and HCTRA's projects should not require the same oversight and monitoring as the first project of a brand new RMA. The issue of whether TxDOT is expected to undertake maintenance and operation of a project has always influenced the nature of its oversight regarding projects built by others. NTTA requests that the requestor's past experience with similar projects, whether the project is to become part of the state highway system or otherwise subject to the jurisdiction of the department, and similar factors be considered in determining the extent in which the executive director will seek changes to matters relating to a project's limits, scope, definition, and design.

Response: The department generally agrees with the principle that whether the department is expected to undertake maintenance and operation of a project will influence the nature of its oversight regarding projects built by others. However, a degree of department involvement is necessary to comply with applicable law and ensure public safety and accountability. The department otherwise agrees with the comment and has made the requested changes other than using a vague similar factors consideration. The use of this consideration fails to provide adequate notice to affected parties of all of the circumstances in which the department will seek changes, as required by the Administrative Procedures Act. The department will also consider the requestor's past experience and performance when determining whether to make final approval of a request subject to the fulfillment of conditions precedent prior to the release of financial assistance, and has revised §27.54(d) accordingly.

Comment: NTTA commented that the investment grade traffic and revenue report required in §27.54(b)(1) should be from a nationally recognized traffic engineer.

Response: The department agrees with this comment and has revised the rules accordingly.

Comment: NTTA commented that the financial assistance agreement and assurances the executive director is authorized to provide in them are critical to the feasibility of a project.

Response: The department agrees that assurances reasonably required by the requestor are necessary, provided those assurances are necessary for the purpose of obtaining, financing for, developing, or operating a project, and provided those assurances are, in the department's reasonable judgment, consistent with the provisions of the agreement. Section 27.55(a) has been revised to state the same. These assurances are consistent with those provided in past agreements with NTTA.

Comment: Koch suggested revising §26.56(b)(1) to provide that the financial assistance agreement would be mutually negotiated by the parties, and that the parties would "endeavor to draft such terms and conditions to generally follow the latest version of the appropriate national or state administration criteria and manuals."

Response: The department disagrees with these comments. It is implied that the agreement will be mutually negotiated. Concerning the second suggestion, the department does not see the prudence in attempting to follow an unidentified manual or unknown criteria in developing a financing agreement.

Comment: NTTA commented that the extent of the requestor's interaction with FHWA should be influenced by its experience. A mandatory rule barring that interaction in every instance prevents TxDOT from shifting some or all of those responsibilities, thereby allowing it to stretch its resources. With regard to the last sentence of §27.55(b)(1), requiring a requestor to reimburse the department for any loss of federal funds resulting from the requestor's failure to comply with applicable law, NTTA considers this to be a mandatory indemnity, and suspects it will render any project subject to its terms incapable of being financed in the public debt markets.

Response: Title 23, Code of Federal Regulations provides that federal-aid funds shall not participate in any cost that is not incurred in conformity with applicable federal and state law, the regulations in that title, and FHWA regulations. All federal-aid highway funds must be spent by and under the supervision of the department. FHWA will look to the department for reimbursement of federal funds used to pay for costs not incurred in conformity with these requirements. This provision does not create an obligation that goes beyond the requirements of existing law and should not render any project subject to its terms incapable of being financed in the public debt markets. Section 27.55(b)(1) has been revised in accordance with this intent, and to provide that the department will provide advance notice of noncompliance and opportunity to cure if applicable and permitted by federal law.

Comment: NTTA commented that §27.55(b)(2) requires substantial modification in order to comport with standard turnpike practice. The NTTA is not currently required to comply with GAAP. NTTA's practices follow the trust agreement requirements, which are similar to GAAP, with two exceptions.

Response: It is the department's understanding that the requirements of existing trust agreements or indentures prevent compliance with GAAP, and to require compliance with GAAP for future projects under separate indentures will impose disjunctive requirements. Section 27.55(b)(2) has been revised to provide exceptions to the requirements for maintaining the requestor's books and records if the exception is required by existing bond indentures or is one that the requestor has historically implemented and accepted by the public debt markets.

Comment: NTTA commented that if a requestor has historically utilized a particular certified public accountant (CPA) to audit its books and records whose work has been acceptable to the rating agencies and investors, it should not be required to duplicate the work performed to select that CPA. While NTTA's auditors follow GAAS, they are unfamiliar with the Governor's Uniform Grant Management Standards. The NTTA's audits have been acceptable to TxDOT, FHWA, the rating agencies, and the capital markets generally. NTTA requests not to be made subject to new standards that may create confusion and additional costs. The audit materials should be delivered to the requestor's board of directors prior to delivery to TxDOT or other third parties.

Response: The department agrees that a requestor should be able to utilize a CPA previously found to be acceptable, and has clarified the rules accordingly. Section 27.55(b)(3) has been revised to provide that an audit must comply with all applicable federal and state requirements. The financial assistance agreement will specify those grant management standards and other requirements a requestor must comply with.

Comment: NTTA stated that the provision in §27.56(a), making a requestor fully responsible for the design and construction of each project it undertakes, is entirely appropriate. However, if the requestor has this responsibility, it must also have the commensurate authority. This provision must be considered when evaluating the extent of TxDOT's oversight. Toll authorities will be reluctant to undertake projects if they perceive that their responsibility for when and how a project is completed far exceeds their authority to make decisions that are crucial to those ends. Public markets respond unfavorably to broad third party oversight and approval rights. Rating agencies and investors prefer that the obligor responsible for servicing the debt has the requisite authority to advance and complete the project that will generate the necessary revenues. Too much third party control results in higher perceived risks, resulting in lower bond ratings or higher interest rates, or both.

Response: The department agrees with the principles addressed in this comment. As previously described, the final rules increase local control and decrease department involvement, while retaining a degree of department involvement necessary to comply with applicable law and ensure public safety and accountability. Project requirements in the final rules incorporate provisions contained in past project agreements with NTTA, and allow exceptions after considering a requestor's past experience and whether the project is intended to become part of the state highway system.

Comment: In §27.56(b)(1), Koch suggested stating that exceptions to the design criteria of this paragraph may be approved under paragraph (2).

Response: The department disagrees with this suggestion. It is clear that paragraph (2) provides an exception to paragraph (1).

Comment: Regarding design exceptions, the NTTA questioned whether the rules should be this inflexible. If an alternative standard presents a prudent engineering solution, should it be disallowed because it is not the best. The preamble states that TxDOT's concerns relate to potential tort liability, but no consideration appears to be given to whether TxDOT will ever operate the project. The rules should allow TxDOT to consider the experience of the requestor and the specific circumstances of each project. Koch suggested similar revisions. Koch suggested "requiring" instead of "authorizing" the executive director to approve an exception if the director determines that the proposed design is an "effective" engineering solution.

Response: The department agrees with most of these suggestions. Section 27.56(b)(2) has been revised to consider whether the project is intended to become part of the state highway system, and whether the proposed design is a "prudent engineering solution." A requestor's past experience is not considered relevant to what is generally an engineering decision.

Comment: NTTA commented that the rules must indicate that TxDOT will be responsive to the concerns of capital markets. Unlimited review periods will be a significant impediment to financing these projects.

Response: The department agrees with this comment. Section 27.56(c)(2) has been revised to provide that the procedures and time line for preliminary design submission and approval by the department will be established in the financial assistance agreement. Similarly, §27.56(c)(4) has been revised to provide that the procedures and time line for submission and approval of the final design plans and contract administration procedures will be established in the financial assistance agreement. Additionally, §27.56(c)(7) has been revised to provide that procedures governing the executive director's approval of contract revisions, including time limits for the department's review, will be set out in the financial assistance agreement.

Comment: NTTA states that the preliminary design information required in §27.56(c)(2) is a significant obstacle to obtaining bond financing for a project. TxDOT cannot approve certain categories of information required in this paragraph. As written, TxDOT could disapprove this information and, because there is no way for a requestor to cure that default, cancel the financial assistance, even though design is 30% complete, bonds have been sold, and right of way acquired.

Response: The department did not intend to approve information that is not subject to approval, and has deleted those categories of information, as well as information that is not available at this stage of project development.

Comment: NTTA stated that the department's review of the materials required in the preliminary design submission and its decision whether to approve the same should be made with due consideration given to the requestor's past experience with similar projects, whether the project is intended to become part of the state highway system or otherwise subject to the jurisdiction of the department, and similar factors.

Response: The department disagrees with this comment. The decision whether to approve a design submission is primarily an engineering decision made on a case-by-case basis.

Comment: Concerning §27.56(c)(3), Koch suggested adding to the end of the subparagraph the phrase, "unless the alternative is approved by the director." Koch also suggested requiring the executive director to approve alternative specifications under the circumstances described in the subparagraph, instead of just authorizing approving.

Response: The department agrees that a reference to alternatives is appropriate, and has revised the subparagraph to add the phrase, "subject to subsection (c)(3)(B) of this section." The department disagrees with the second suggestion as an unnecessary limitation on the director's discretion.

Comment: Also concerning §27.56(c)(3), NTTA commented that the requestor's past experience with similar projects, whether the project is intended to become part of the state highway system or otherwise subject to the jurisdiction of the department, and similar factors are relevant to the decision whether to approve alternative specifications. The likelihood of TxDOT operating the facility is certainly germane to the issue of TxDOT's approval of the quality and durability of the finished product.

Response: The department agrees that whether a project is intended to become part of the state highway system should be considered in determining whether to approve an alternative specification, but disagrees with the remainder of the comment. Section 27.56(c)(3)(B) has been revised accordingly.

Comment: NTTA questioned whether requiring every contract revision to be sent to the executive director is consistent with the aims of Senate Bill 342. NTTA asks whether a $10 change order trigger this extent of review, particularly since construction abates in the meantime, and requests that changes below a certain dollar amount require only notice and not approval, or, at a minimum, be handled at the district level.

Response: The department agrees that certain contract revisions need not be approved by the department, and that such a requirement would serve to hinder a project's timely completion. Section 27.56(c)(7) has been revised to require only those contract revisions affecting prior environmental approvals or significantly revising the project scope or geometric design to be approved by the department.

Comment: Koch suggested revising §27.56 to state that contract agreements would be drafted on mutually acceptable terms negotiated by the parties, and that the parties would "endeavor to draft such terms and conditions to generally follow" the appropriate national or state administration criteria.

Response: The department disagrees with these comments. The department believes that the changes made in response to the NTTA comments should adequately resolve concerns with this paragraph. Koch may have misunderstood the purpose of this paragraph, which does not involve revisions to the agreement between the requestor and the department, but the contract between the requestor and its construction contractor.

Comment: NTTA states that the requirement in §27.56(c)(11) that all work performed by the requestor to be at the sole expense of the requestor does not appear in Senate Bill 342, and would likely prohibit the arrangement under another agreement in which the NTTA is responsible for improving the state highway system.

Response: This requirement has been deleted.

Comment: The NTTA requests that the rules be amended to allow the executive director to grant exceptions to the requirements in §27.56(c)(4), (5), (6), and (7) based upon a consideration of requestor's past experience with similar projects, whether the project is intended to become part of the state highway system

or otherwise subject to the jurisdiction of the department, and similar factors.

Response: The department disagrees with this comment. Past project agreements with NTTA have contained similar requirements.

Comment: NTTA commented that, with regard to the maintenance standards and procedures prescribed in §27.57, there is not a more relevant issue to their formulation and application than whether TxDOT will ultimately be responsible for the roadway. TxDOT should be authorized to consider that factor, along with the requestor's experience.

Response: The department agrees with this comment and has revised §27.57 accordingly.

Comment: NTTA stated that the mandatory indemnity in §27.58(5) likely renders the affected project incapable of receiving financing in the public markets. Remedies are more properly determined on a case-by-case basis.

Response: The department agrees with this comment. That paragraph has been deleted. Department remedies resulting from a failure to perform by the requestor will be set out in the financial assistance agreement.

Comment: Koch commented that the toll equity rules as proposed appear to stifle and limit the innovation and creativity of local public officials and their private sector partners in the process of building transportation systems. The rules for how these new roads are planned, financed, designed, built, and maintained are prescriptive and restrict these entities from gaining the full potential value from private sector participation. These entities should be allowed to explore new and better ways of developing these transportation projects in order to achieve the best value for the taxpayer. The risks involved in applying new technology can be mitigated. The toll equity rules also tend to shift many risks on the entity without providing them with the control and flexibility necessary to mitigate or manage those risks. This may make financial markets apprehensive about buying the bonds.

Response: The department agrees with the principles expressed in this comment. As previously described, the final rules increase local control and decrease department involvement, while retaining a degree of department involvement necessary to comply with applicable law and ensure public safety and accountability. The department intends for a requestor to exercise creativity and innovation to the extent allowed by applicable law.

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department and, more specifically, Transportation Code, §222.103, which requires the commission to establish rules implementing the authority granted to the department to participate in the financing of toll facilities of public or private entities.

§27.51. Definitions.

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

(1) AASHTO--The American Association of State Highway and Transportation Officials.

(2) Commission--The Texas Transportation Commission.

(3) Department--The Texas Department of Transportation.

(4) Design manual--The latest editions of and successors to all design manuals available from the department, including but not limited to the following:

(A) Roadway Design Manual;

(B) operations and procedures manual of the Environmental Affairs Division;

(C) Pavement Design Manual;

(D) Bridge Design Manual;

(E) Bridge Project Development Manual;

(F) Bridge Geotechnical Manual;

(G) Hydraulic Design Manual;

(H) Texas Manual on Uniform Traffic Control Devices;

(I) standard highway sign designs for Texas; and

(J) traffic control standard sheets booklet of the traffic operations division.

(5) Development costs--Costs associated with the development of a toll facility before all environmental clearances required to commence construction of the facility have been obtained, including, but not limited to, expenses incurred for the preparation of preliminary engineering, traffic and revenue estimates, major investment studies, environmental impact or assessment studies, and feasibility studies and analyses.

(6) Environmental Permits, Issues, and Commitments (EPIC)--Any permit, issue, coordination, commitment, or mitigation obtained to satisfy social, economic, or environmental impacts of a project, including, but not limited to, sole source aquifer coordination, wetland permits, stormwater permits, traffic noise abatement, threatened or endangered species coordination, archeological permits, and any mitigation or other commitments associated with any of those issues.

(7) Executive director--The executive director of the Texas Department of Transportation or designee.

(8) Metropolitan planning organization--An organization designated in certain urbanized areas to carry out the transportation planning process as required by Title 23, United States Code, §134.

(9) MPO--A metropolitan planning organization.

(10) Nonattainment area--An area designated by the U.S. Environmental Protection Agency as not meeting the air quality standards outlined in the Clean Air Act.

(11) Requestor--The public or private entity requesting financing under this subchapter.

§27.52. Available Financing.

The commission may loan or grant funds under this subchapter for any combination of the following purposes relating to the development, acquisition, construction, maintenance, and operation of a toll facility:

(1) development costs;

(2) preparation of project plans, specifications, and engineer's estimate;

(3) construction, including right of way acquisition and utility relocation;

(4) operation;

(5) maintenance; and

(6) necessary or incidental administrative, legal, and other expenses.

§27.53. Request.

(a) Eligibility.

(1) A public or private entity that is authorized by state law to construct or maintain a toll facility is eligible to submit a request for financing under this subchapter.

(2) A private entity is not eligible to submit a request for a grant.

(b) Basic request. Except as otherwise noted below with respect to a request for funding of development costs only, a request must be accompanied by:

(1) an overview of the project, which shall include a description of the project, the estimated total cost of the project or the preliminary cost estimate of development costs if the request is to fund only development costs, and the proposed use of the requested financial assistance;

(2) a list of all proposed funding sources, including, but not limited to, bond revenue, any equity contribution from the requestor, and grants or loans requested under this subchapter, and the proposed use of the funding;

(3) the requested financing terms if loan financing is requested;

(4) a description of the need, or potential need in the case of a request for financing of development costs, for the project and potential impact on traffic congestion and mobility;

(5) a statement of the amount of unencumbered (or unreserved) cash on hand or the requestor's latest audited financial statement;

(6) the latest bond rating obtained by the requestor when using similar sources of revenue to be pledged, if applicable;

(7) a preliminary design study which includes:

(A) an initial route and potential alignments;

(B) the project's logical termini and independent utility, if applicable; and

(C) potential revisions or changes to state highway system facilities necessitated by the project;

(8) unless the request is to fund development costs only, official written approval of the project by the governing body of each entity that may become liable for repayment of any financial assistance;

(9) a binding commitment that the environmental consequences of the proposed project will be fully considered in accordance with, and that the proposed project will comply with, all applicable local, state, and federal environmental laws, regulations, and requirements;

(10) a binding commitment to implement all EPIC; and

(11) documentary evidence, to the extent then available, of community involvement in development of the proposed project and public opinion about it.

(c) Supplemental information and data. Except as provided in subsection (d) of this section, the requestor shall submit the following supplemental information and data.

(1) Financial feasibility study. Unless the request is to fund development costs only, the requestor shall submit a financial feasibility study that includes:

(A) a project construction or asset acquisition schedule identifying the timing, amount, and source of all funds required;

(B) an analysis of the expected financing period of the project;

(C) a pro forma annual cash flow analysis for the expected financing period of the project showing:

(i) if applicable, anticipated revenues to be used in repayment by source;

(ii) anticipated disbursements for preliminary studies and engineering, construction, EPIC, right of way acquisition, operations, and maintenance;

(iii) anticipated debt service coverage ratios for each debt obligation; and

(iv) funds expected to be used to meet the requirements of any sinking funds, reserve funds, and loan amortization payments;

(D) a description of the methods used in preparing the financial feasibility study, the assumptions contained in the study, and persons and entities responsible for the preparation of the study;

(E) if loan financing is requested under this subchapter, the length of time the financial assistance will be outstanding or obligated;

(F) the anticipated interest rates for any and all debt outstanding during the term of the financial assistance;

(G) the anticipated benefits to the state and to the requestor resulting from the assistance; and

(H) based upon then available information and analyses, a description of how the requested assistance will, to the extent applicable, accomplish the following (it being understood that failure to accomplish all of these items will not necessarily cause a request to be ineligible for financial assistance):

(i) expand the availability of funding for transportation projects;

(ii) reduce direct state costs;

(iii) maximize private and local participation in financing projects; and

(iv) improve the efficiency of the state's transportation systems.

(2) Project impacts. The requestor shall provide the following information concerning the impact of the project:

(A) how the project will be consistent with the Statewide Transportation Plan and, if appropriate, with the metropolitan transportation plan developed by an MPO;

(B) if the project is in a nonattainment area, how the project will be consistent with the Statewide Transportation Improvement Program, with the conforming plan and Transportation Improvement Program for the MPO in which the project is located (if necessary), and with the State Implementation Plan; and

(C) a preliminary description of any known environmental, social, economic, or cultural resource issues, such as hazardous

material sites, impacts on wetlands and other water resources, endangered species, parks, neighborhoods, businesses, historic buildings or bridges, and archeological sites.

(d) Waiver of required information or data. The executive director may waive submission of individual items of information or data required by subsection (c) of this section if:

(1) the information or data required by this section is not relevant to the project or the financial assistance requested;

(2) the department already possesses information or data in a format that may be substituted for the required information or data; or

(3) the past performance of the requestor on previous projects developed in collaboration with the department indicates that the requestor will adequately and prudently address the issues and impacts described in the requested information or data.

§27.54. Commission Action.

(a) Preliminary approval.

(1) Considerations. Prior to granting preliminary approval of an eligible project, the commission will consider:

(A) the transportation need for and anticipated public benefit of the project, including such factors as the project's potential ability to accelerate needed transportation facilities or to reduce financial and other burdens on the commission and the department regarding the development, operation, and maintenance of such facilities;

(B) availability of funding from all sources;

(C) the percentage of the total project cost that is represented by the requested financial assistance;

(D) the financial feasibility of the project;

(E) potential social, economic, and environmental impacts of the project;

(F) evidence of local public support; and

(G) the requestor's past experience with similar projects and past performance working in collaboration with the department in the development of such projects, if applicable.

(2) Project requirements. The commission may grant preliminary approval of a project for financing if it finds that:

(A) the project is consistent with the Statewide Transportation Plan and, if appropriate, with the metropolitan transportation plan developed by an MPO;

(B) if the project is in a nonattainment area, the project will be consistent with the Statewide Transportation Improvement Program, with the conforming plan and Transportation Improvement Program for the MPO in which the project is located (if necessary), and with the State Implementation Plan;

(C) the project will improve the efficiency of the state's transportation systems;

(D) the project will expand the availability of funding for transportation projects or reduce direct state costs; and

(E) for loan financing, the application shows that the project and the requestor are likely to have sufficient revenues to assure repayment of the loan according to the terms of the agreement.

(3) Authorized actions. By granting preliminary approval, the commission authorizes the executive director to:

(A) evaluate the project's limits, scope, definition, design, and other features, and identify any which adversely affect the financing of the project, including EPIC;

(B) negotiate the amount, type and timing of disbursements of financial assistance;

(C) for loan financing, negotiate an interest rate, a repayment schedule, collateral securing the financial assistance, and default provisions;

(D) negotiate provisions providing, if necessary for the project's financial feasibility, for the subordination of loan financing provided under this subchapter to any other debt financing for the project; and

(E) negotiate all other provisions necessary to complete an agreement under this subchapter.

(4) Relevant facts. In determining the extent to which the executive director will seek changes to the features described in subsection (a)(3)(A) of this section, the executive director shall consider:

(A) the requestor's past experience with similar projects; and

(B) whether the project is intended to become part of the state highway system or otherwise subject to the jurisdiction of the department.

(b) Project impacts and traffic and revenue report.

(1) Prior to receiving final approval under subsection (c) of this section for the grant or loan of funds for the construction of a project, the requestor shall:

(A) complete a study of the social, economic, and environmental impacts of the project, consistent with the spirit and intent of the National Environmental Policy Act, Title 42, United States Code, §§4321 et seq., and Title 23, United States Code, §109(h), and provide for public involvement in accordance with the requirements of Chapter 2, Subchapter C of this title (relating to Environmental Review and Public Involvement For Transportation Projects); and

(B) obtain an investment grade traffic and revenue report for the project from a nationally recognized traffic engineer.

(2) The executive director may waive the requirements of paragraph (1)(A) or (B) of this subsection if the director determines that the study or report is inapplicable or unnecessary due to the nature of the requested assistance.

(c) Final approval. Subsequent to preliminary approval, completion of negotiations, and compliance with this section, the commission may grant final approval if it determines that:

(1) providing financial assistance will prudently provide for the protection of public funds; and

(2) the project will provide for all reasonable and feasible measures to avoid, minimize, or mitigate adverse environmental impacts.

(d) Contingencies. The commission may make its preliminary approval contingent upon the requestor making changes, performing other acts, or establishing certain conditions necessary to provide for the adequacy of any required repayments. The commission may make its final approval subject to the requestor fulfilling specified conditions precedent to the release of financial assistance under this subchapter, which shall also be set forth in the financial assistance agreement. The

necessity and nature of such changes, acts or conditions will be determined with consideration for the requestor's past experience with similar projects and past performance working in collaboration with the department in the development of such projects, especially with regard to the requestor's previous use of the commission's financial assistance.

§27.55. Financial Assistance Agreement.

(a) Executive Director. The executive director will negotiate the terms of agreements deemed necessary to comply with any requirements of preliminary approval, to protect the public's safety, and to prudently provide for the protection of public funds while furthering the purposes of this subchapter. These agreements shall include, but not be limited to, terms provided for in this section, as applicable to a particular project. The department shall provide in an agreement such assurances as are reasonably and customarily required by the requestor that are necessary for the purpose of obtaining financing for, developing, or operating a particular project, provided that such assurances are, in the department's reasonable judgment, consistent with the provisions of the agreement.

(b) Performance of work.

(1) The requestor shall comply with applicable state and federal law, and with all terms and conditions of any agreements. If approval or concurrence of the Federal Highway Administration, the Federal Transit Administration, or any other federal agency is required, the department may require that the requestor seek approval or concurrence through the department. Upon request and, to the extent applicable and permitted by federal law, after reasonable advance notice and opportunity to cure from the department, the requestor shall reimburse the department for any federal funds that are applied by the requestor to pay costs not incurred in conformity with applicable state and federal law.

(2) The requestor shall maintain its books and records in accordance with generally accepted accounting principles in the United States, as promulgated by the Governmental Accounting Standards Board, the Financial Accounting Standards Board, or pursuant to applicable federal or state laws or regulations, and with all other applicable federal and state requirements, subject to any exceptions required by existing bond indentures of the requestor that are applicable to the project, and any exceptions the requestor has historically implemented that have been acceptable to the public debt markets.

(3) The requestor shall, at the requestor's cost, have a full audit performed annually of its books and records by an independent certified public accountant selected by the requestor and reasonably acceptable to the department. The audit must be conducted in accordance with generally accepted auditing standards promulgated by the Financial Accounting Standards Board, the Governmental Accounting Standards Board, or the standards of the Office of Management and Budget Circular A-133, Audits of States, Local Governments and Non-profit Organizations, as applicable, and with all other applicable federal and state requirements. The requestor shall cause the auditor to provide a full copy of the audit report and any other management letters or auditor's comments directly to the department within a reasonable period of time after they have been provided to the governing body of the requestor.

(4) The requestor shall retain all work papers and reports for a minimum of four years from the date of the audit report, unless the department notifies the requestor in writing to extend the retention period. If requested by the department, audit work papers shall be made available to the department, within 30 days of request, at any time during the retention period.

(5) The requestor shall retain all original project files, records, accounts, and supporting documents until project completion or until all financial assistance under this subchapter has been repaid, if applicable, or for the period of time required by applicable federal and state law, if longer, unless relieved of this requirement by the department in writing.

(6) Prior to the department assuming jurisdiction of the project, if applicable, the requestor shall ensure that the project, including all its components and appurtenances, is in a condition that complies with §27.57 of this subchapter. All design data, surveys, construction plans, right of way maps, utility permits, and agreements with other entities relating to the project shall be transferred to the department once the department assumes jurisdiction of the project. This paragraph applies to projects that will become a part of the state highway system.

§27.56. Design and construction.

(a) Responsibility.

(1) The requestor is fully responsible for the design and construction of each project it undertakes, including:

(A) ensuring that all EPIC are addressed in project design;

(B) assessing field changes for potential environmental impacts; and

(C) obtaining any necessary EPIC required for field changes.

(2) All construction plans shall be signed, sealed, and dated by a professional engineer licensed in Texas.

(b) Design criteria.

(1) Plans and specifications. Project plans and specifications must be in compliance with either the latest version of the design manuals or the latest version of AASHTO standards, including the AASHTO Policy on Geometric Design of Highways and Streets, the AASHTO Pavement Design Guide, and the AASHTO Bridge Design Specifications.

(2) Exceptions to design criteria. A requestor may request approval to deviate from the required design criteria for a particular design element on a case-by-case basis. The request for approval shall state the criteria for which an exception is being requested and must include a comprehensive description of the circumstances and engineering analysis supporting the request. The executive director may approve an exception after determining that the particular criteria could not reasonably be met due to physical, environmental or other relevant factors (and in making this determination, the executive director shall consider whether the project is intended to become part of the state highway system or otherwise subject to the jurisdiction of the department), and that the proposed design is a prudent engineering solution.

(c) Project development.

(1) Access. For proposed projects that will change the access to an interstate highway, the requestor shall submit to the department all data necessary for the department to request Federal Highway Administration approval.

(2) Preliminary design submission and approval. When design is approximately 30% complete, the requestor shall send the following preliminary design information to the department for review and approval in accordance with the procedures and time line established in the financial assistance agreement:

(A) a completed Design Summary Report form as contained in the department's Project Development Process Manual;

(B) a design schematic depicting plan, profile, and superelevation information for each roadway;

(C) typical sections showing existing and proposed horizontal dimensions, cross slopes, location of profile grade line, pavement layer thickness and composition, earthen slopes, and right of way lines;

(D) bridge, retaining wall, and sound wall layouts;

(E) hydraulic studies and drainage area maps showing the drainage of waterways entering the project and local project drainage;

(F) an explanation of the anticipated handling of existing traffic during construction;

(G) when structures meeting the definition of a bridge as defined by the National Bridge Inspection Standards are proposed, an indication of structural capacity in terms of design loading;

(H) an explanation of how the U.S. Army Corps of Engineers permit requirements, including associated certification requirements of the Texas Natural Resource Conservation Commission, will be satisfied if the project involves discharges into waters of the United States; and

(I) the location and text of proposed mainlane guide signs shown on a schematic that includes lane miles or arrows indicating the number of lanes.

(3) Construction specifications.

(A) All plans, specifications, and estimates developed by or on behalf of the requestor shall conform to the latest version of the department's Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, and shall conform to department required special specifications and special provisions, subject to subsection (c)(3)(B) of this section.

(B) The executive director may approve the use of an alternative specification if the proposed specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public. In deciding whether to approve the use of an alternative specification, the executive director shall consider whether the project is intended to become part of the state highway system or otherwise subject to the jurisdiction of the department.

(4) Submission and approval of final design plans and contract administration procedures. When final plans are complete, the requestor shall send the following information to the executive director for review and approval in accordance with the procedures and time line established in the financial assistance agreement:

(A) seven copies of the final set of plans, specifications, and engineer's estimate (PS&E) that have been signed and sealed by the responsible engineer;

(B) summarized or highlighted revisions to information provided with the preliminary design submission;

(C) proposal necessary for bidding the project in compliance with applicable state and federal requirements;

(D) contract administration procedures containing criteria that comply with the applicable national or state administration criteria and manuals; and

(E) location and description of all EPIC addressed in construction.

(5) Contract bidding and award. The requestor shall not advertise the project for receipt of bids until it has received approval of the PS&E from the department. Procedures relating to bidder qualification, bidding, award, and execution of a contract for the development and maintenance of a project that is financed with state or federal funds shall comply with either the policies and procedures prescribed in Chapter 9, Subchapter B of this title (relating to Highway Improvement Contracts), or with policies and procedures that comply with the applicable requirements of federal law and with the applicable requirements of state law that are intended to ensure fair and open competition.

(6) Construction inspection and oversight. The requestor is responsible for overseeing all construction operations, including the oversight and follow-through with all EPIC. Inspection and project oversight shall be performed in accordance with requirements prescribed in the financial assistance agreement.

(7) Contract revisions. All contract revisions shall comply with the latest version of the applicable national or state administration criteria and manuals, and must be submitted to the department for its records. Any revision that affects prior environmental approvals or significantly revises the project scope or the geometric design must be submitted to the executive director for approval prior to beginning the revised construction work. Procedures governing the executive director's approval, including time limits for department review, shall be included in the financial assistance agreement.

(8) As-built plans. Upon completion of construction of the project, the requestor shall file with the department a set of the as-built plans incorporating any contract revisions. These plans shall be signed, sealed, and dated by a licensed professional engineer in Texas certifying that the project was constructed in accordance with the plans and specifications.

(9) Document and information exchange. If available, the requestor agrees to electronically deliver to the department all materials used in the development of the project including, but not limited to, aerial photography, computer files, surveying information, engineering reports, environmental documentation, general notes, specifications, and contract provision requirements.

(10) State and federal law. The requestor shall comply with all federal and state laws and regulations applicable to the project, and shall provide or obtain all applicable permits, plans, and other documentation required by a federal, state, or local governmental entity.

(11) Work on state right of way. All work required within the limits of state owned right of way shall be accomplished only pursuant to express written agreement with the department.

§27.57. Maintenance.

(a) The department may require specific standards and procedures to be used in maintenance of the project.

(b) All structures defined as a bridge by the National Bridge Inspection Standards shall be maintained in compliance with applicable state and federal requirements. The department will perform safety inspections of these structures in accordance with federal requirements.

(c) In establishing the standards and procedures described in subsection (a) of this section, if any, or in considering exceptions to the standards and inspection procedures described in subsection (b) of this section, the department shall consider:

(1) the requestor's past experience with similar projects (if applicable); and

(2) whether the project is intended to become part of the state highway system or otherwise subject to the jurisdiction of the department.

§27.58. Financial and Credit Requirements.

A requestor receiving a loan under this subchapter shall agree to:

(1) provide collateral and security for repayment of financial assistance and completion of the project, or other protections as the executive director may deem necessary;

(2) repay the financial assistance at the specified interest rate over a specified time period according to the repayment schedule;

(3) submit the following financial and operating reports to the department within 30 days of adoption or disclosure, approved by the governing body of the requestor and certified as correct by its chief administrative officer:

(A) the annual operating and capital budgets adopted by the requestor each fiscal year pursuant to a trust agreement or indenture or equivalent document securing bonds issued for a project, and any amended or supplemental operating or capital budget; and

(B) annual financial information and notices of material events required to be disclosed under Rule 15c2-12 of the United States Securities and Exchange Commission (17 C.F.R. §240.15c2-12); and

(4) abide by provisions governing default.

This agency 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 July 26, 2002.

TRD-200204633
Richard D. Monroe
General Counsel
Texas Department of Transportation
Effective date: August 15, 2002
Proposal publication date: February 15, 2002
For further information, please call: (512) 463-8630

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

Notice is given that the Commissioner of Insurance will consider a petition filed by the staff of the Texas Department of Insurance (Staff) to amend the Texas Statistical Plan for Residential Risks. The proposed changes are necessary in order to collect experience that will be used to analyze and track the use of recently approved residential property policy forms. Staff's petition (Ref. P-0702-30-I) was filed on July 31, 2002.

A public hearing on this matter will not be held unless a separate request for a hearing is submitted to the Office of the Chief Clerk during the comment period as defined herein.

Staff proposes amendments to the Texas Statistical Plan for Residential Risks to amend and add fields that will allow the reporting of experience relating to the use of recently approved residential policy forms.

The Commissioner has jurisdiction of this matter pursuant to the Insurance Code, Article 5.96 and §§38.204 and 38.207.

Copies of the full text of the Staff petition and the proposed amendments are available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas, 78714-9104. For further information or to request copies of the petition and proposed amendments, please contact Sylvia Gutierrez at (512) 463-6327 (refer to Ref. No. P-0702-30-I).

Comments on the proposed amendments must be submitted in writing within 30 days after publication of the proposal in the Texas Register to the Office of the Chief Clerk, P. O. Box 149104, MC113-2A, Austin, Texas 78714-9104. An additional copy of the comments should be submitted to C.H. Mah, Senior Associate Commissioner for Property & Casualty, P. O. Box 149104, MC105-5G, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts action taken under this article from the requirements of the Administrative Procedure Act (Government Code, Title 10, ch. 2001).

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

TRD-200204860
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 31, 2002

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Proposed Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96

Notice is given that the Commissioner of Insurance will consider a petition filed by Nationwide Lloyds Insurance Company (Nationwide) that requests the adoption of three new residential property policy forms which include form no. HO-542 (homeowners policy), form no. HC-542 (condominium policy), and form no. HT-542 (tenants policy) and further requests the adoption of thirteen new endorsements, two declarations pages, and one certificate of insurance for use in the State of Texas.

A public hearing on this matter will not be held unless a separate request for a hearing is submitted to the Office of the Chief Clerk during the comment period as defined herein.

The Nationwide petition was filed pursuant to the Texas Insurance Code Article 5.35 (b), which provides that the Commissioner may adopt policy forms and endorsements of national insurers. Nationwide conforms to the definition of a national insurer and is, therefore, authorized to file its policies and endorsements with the Texas Department of Insurance to be considered by the Commissioner for adoption.

Nationwide's original petition on this matter, filed on June 10, 2002, requested the adoption of a proposed new Texas homeowners policy, tenants policy, and condominium policy. Since the filing of the original petition, Nationwide and Department staff have engaged in discussions and dialogue relating to the proposed forms and endorsements. Nationwide has made several modifications to the homeowners, tenants, and condominium policies, as originally filed, as a result of discussions with Department staff. Nationwide amended its June 10, 2002 filing, on July 17, 2002 by providing Flesch scores for the policy forms and endorsements and by making editorial revisions to the policy forms including changing the form numbers from HO-142 to HO-542, HC-142

to HC-542, and HT-142 to HT-542 to avoid potential confusion with TDI endorsement no. HO-142. In a letter dated July 26, 2002, Nationwide made additional changes in response to concerns expressed by staff during the policy and endorsement review.

I. Nationwide Homeowners Policy. The following is a general description of the coverage provided by the proposed Nationwide homeowners policy that has been filed for adoption by the Commissioner pursuant to Article 5.35 (b).

A. Section I-Property Coverages.

1. The policy covers the dwelling and other structures on the premises against the risk of direct physical loss, with certain exceptions.

2. It covers personal property on and away from the premises against losses by fire or lightning, windstorm or hail, explosion, riot or civil commotion, aircraft, vehicles, smoke, vandalism and malicious mischief, theft, falling objects, weight of ice, snow, or sleet, sudden and accidental discharge or overflow or water or steam, sudden and accidental tearing apart, and freezing.

3. It provides loss of use which covers additional living expenses if a covered loss requires the insured to leave the residence premises and fair rental value when part of the premises is rented to others.

4. The policy excludes loss caused by mold, fungus or other microbes. However, as an exception to the exclusion, Nationwide will provide coverage if the mold, fungus or other microbes is caused by or results from sudden and accidental discharge or overflow of water which otherwise would be covered under the policy. Sudden and accidental shall include a loss event that is hidden or concealed for a period of time until it is detectable. A hidden loss must be reported to Nationwide no later than 30 days after the date the loss was detected or should have been detected. The cost to treat, contain, remove or dispose of mold, fungus or other microbes beyond that which is required to repair or replace the covered property physically damaged by water; the cost of testing or monitoring of air or property; and the cost of any decontamination of the residence premises is excluded. (See Section I-Property Exclusions, item 1.m.) Pursuant to Commissioner's Order No. 01-1105, the HO-B modified by endorsement no. HO-162A provides coverage for removal of ensuing mold, fungi, or other microbial losses caused by sudden and accidental discharge, leakage or overflow of water if the water loss is a covered loss. However, the modified HO-B does not provide coverage for the remediation of mold or fungus.

B. Section II-Liability Coverages.

1. Coverage E-Personal Liability. The policy covers payment on behalf of the insured of all sums, up to the stipulated limit, which the insured is legally obligated to pay as damages because of bodily injury or property damage arising out of the residence premises or personal activities.

2. Coverage F-Medical Payments to Others. The policy covers medical and related expenses, subject to the stipulated limit, arising out of accidents to persons other than the insured and residents of the premises.

3. Additional Coverages. Additional coverage is provided for claim expenses, first aid expenses, and damage to property of others.

II. Nationwide Condominium Policy. This policy for condominium covers items of real property which are the insured's responsibility under the governing rules of a condominium. This policy covers personal property on and away from the premises against losses by fire or lightning; windstorm or hail; explosion; riot or civil commotion; aircraft; vehicles; smoke; vandalism and malicious mischief; theft; falling objects; weight of ice, snow, or sleet; sudden and accidental discharge or overflow of water or steam; accidental electrical damage to electrical appliances; sudden and accidental tearing apart; and freezing. This policy also contains loss of use, additional coverages, and liability coverage provisions that are the same as those described for the Nationwide homeowners policy.

III. Nationwide Tenants Policy. This is a tenants policy that covers personal property on and away from the premises against losses by fire or lightning; windstorm or hail; explosion; riot or civil commotion; aircraft; vehicles; smoke; vandalism and malicious mischief; theft; falling objects; weight of ice, snow, or sleet; sudden and accidental discharge or overflow of water or steam; accidental electrical damage to electrical appliances; accidental tearing apart; and freezing. This policy also contains loss of use, additional coverages, and liability coverage provisions that are the same as those described for the Nationwide homeowners policy.

IV. Comparison of the Proposed Nationwide Policies to the Currently Prescribed Texas Homeowners Policy-Form B (HO-B). The HO-B has traditionally been the predominant policy form issued in Texas for owner occupied dwellings. In the course of staff's review of Nationwide's proposed homeowners, condominium, and tenants policies, staff has noted several differences in the coverage provided in the HO-B and that provided in the proposed Nationwide policy forms. Since the proposed tenants policy contains the same coverages as the proposed homeowners policy (except the tenants policy does not provide dwelling coverage) and the proposed condominium policy also contains the same coverages as the homeowners policy (except that the dwelling coverage is much more limited) the restrictions and enhancements in coverage will be discussed in terms of a comparison between the Nationwide homeowners policy and the HO-B. However, it should be noted that most of the comparisons of coverage also apply to the tenants and condominium policies.

V. Restrictions In Coverage. The following is a list of some of the restrictions in coverage that are contained in the proposed homeowners policy as compared to the existing HO-B. This list is not intended to cover every restriction in coverage that is contained in the proposed Nationwide policy forms. If more detailed coverage information is desired, a side by side comparison of the Nationwide homeowners policy and the HO-B, a side by side comparison of the Nationwide condominium policy and the HO-B-CON, and a side by side comparison of the Nationwide tenant policy and the HO-BT are available from the Department upon request.

A. Coverage for Boats, Boat Trailers, and Other Trailers.

The Nationwide policy provides up to $1,000 in coverage for watercraft and outboard motors, including trailers, furnishings, and equipment; and other utility type trailers not used with watercraft for losses that occur on and off premises for named perils. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, items 10. and 11.) The Nationwide policy provides theft coverage for watercraft, including their trailers, furnishings, equipment and outboard motors or trailers and campers if the theft occurs on the residence premises; however, if the theft occurs off of the residence premises, theft coverage is excluded. (See Section 1-Perils Insured Against, item 9) The Nationwide policy provides windstorm and hail coverage for boats and their trailers only if they are inside a fully enclosed building. (See Section 1-Perils Insured Against, item 2.) The HO-B provides coverage up to the limits of liability that apply to Coverage B (Personal Property) for boats and boat trailers while located on land on the residence premises for all perils insured against. Additionally, the HO-B provides coverage up to the limits of liability that apply to Coverage B (Personal Property) for trailers designed for use principally off public roads (e.g., travel trailers) whether on or off premises. (See Section 1-Property Coverage, Coverage B (Personal Property), Property Not Covered, items 4. and 6.)

B. Coverage for Firearms.

The Nationwide policy limits the coverage for firearms to losses by the peril of theft with a maximum limit of liability of $1,000. (See Section I- Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 2.) The HO-B provides coverage for firearms to the extent described under the Perils Insured Against section of the policy, including the peril of theft, up to the limits of liability that apply to Coverage B (Personal Property.)

C. Coverage for Goldware and Silverware.

The Nationwide policy limits the coverage for goldware, gold-plated ware, silverware, silver-plated ware, and pewterware to losses by the peril of theft with a maximum limit of liability of $2,500. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 4.) The HO-B provides coverage for goldware and silverware to the extent described under the Perils Insured Against section of the policy, including the peril of theft, up to the limits of liability that apply to Coverage B (Personal Property.)

D. Coverage for Golf Carts.

The Nationwide policy does not cover golf carts unless used to service the residence premises or while used for golfing purposes. (See Section I - Property Coverages, Coverage C - Personal Property, Property Not Covered, item 4. c) The HO-B provides coverage for golf carts up to the limits of liability that apply to Coverage B (Personal Property) to the extent described under the Perils Insured Against section of the policy. (See Section I - Property Coverage, Coverage B (Personal Property) Property Not Covered, item 3.c.)

E. Coverage for Business Property

The Nationwide policy limits coverage for business property on the residence premises, except computers including their hardware and software to $500. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 9.) The HO-B provides $2500 coverage for business personal property, except samples or articles for sale or delivery, while on the residence premises. (See Coverage B (Personal Property) Special Limits of Liability, item 4.)

F. Debris Removal

Nationwide provides reasonable expense incurred for removing debris of covered property if the peril causing the loss is covered. This includes debris of trees that cause damage to covered property or covered structures, or that obstruct access to covered structures if such access is necessary to repair or replace the structure. However, coverage is only provided to move away from, or off of, covered property the debris of trees that cause damage to covered property. (See Additional Property Coverages, item 1.) The HO-B will pay the expense for removal from the residence premises of a tree that has damaged covered property if a peril insured against causes the tree to fall. (See Extensions of Coverage, item 1.)

G. Coverage for Water Damage.

1. The Nationwide policy specifies that it does not include coverage for losses to the dwelling and other structures caused by continuous or repeated seepage or leakage of water or steam over a time period from a heating, air conditioning or automatic fire protective sprinkler system, household appliance, or plumbing system. (See Section I Property Exclusions, item 3.e.) The HO-B provides coverage for water damage from repeated and continuous seepage or leakage of water or steam from a plumbing system, heating or air conditioning system, or household appliance which occurs over a period of time. (See Section 1-Perils Insured Against, item 9.)

2. The Nationwide policy does not cover losses caused by water which backs up through sewers or drains from outside the dwelling's plumbing system or which overflows from a sump pump, sump pump well, or similar device designed to remove subsurface water or water-borne material from the foundation area. (See Section I-Exclusions, item 1.b.(2)). The HO-B provides coverage for damage to property covered under Coverage A (Dwelling) or Coverage B (Personal Property) for a loss caused by back up or overflow from a sewer, drain, or sump pump of sewage or water even if it is from outside the residence premises. Property covered under Coverage B (Personal Property) is specifically insured for loss caused by accidental discharge, leakage, or overflow of water or steam from within a plumbing system, heating or air conditioning system, or household appliance which may include a loss caused by water or sewage from outside the residence premises that backs up or overflows from a sewer, drain, or sump pump. (See Section 1-Perils Insured Against, Coverage B-Personal Property, item 9.)

H. Coverage for Vandalism and Malicious Mischief.

The Nationwide policy excludes loss from vandalism and malicious mischief or breakage of glass if the dwelling is vacant for more than 30 consecutive days immediately before a loss. (See Section I-Exclusions, item 2.d.) The HO-B provides coverage for all perils insured against for up to 60 days of vacancy. (See Section 1-Conditions, item 13.)

I. Nationwide Policy Exclusions.

1. The Nationwide policy excludes loss caused by a fault, weakness, defect or inadequacy in specifications, planning, zoning, design, workmanship, construction, materials, surveying, grading, backfilling, development or maintenance of any property whether on or off of the residence premises. (See Section I-Exclusions, item 2. a.) The HO-B does not contain this exclusion.

2. Nationwide excludes settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings. (See Section I - Exclusions, item 1. f.) The HO-B provides coverage for an ensuing loss caused by a covered water loss to foundations, walls, floors, ceilings, roof structures, walks, drives, curbs, fences, retaining walls or swimming pools. (See Section I - Exclusions, item 1. h.)

J. Coverage for Loss of Use.

The Nationwide policy limits the time allowable for payment of Additional Living Expense and Fair Rental Value to 12 months. (See Section I-Property Coverages, Coverage D-Loss of Use, item 1. 2.) The HO-B does not have a time limitation for the payment of Additional Living Expense and Fair Rental Value.

VI. Coverage Enhancements. The following is a list of some of the areas where the proposed Nationwide homeowners policy provides coverage that is broader than the coverage provided in the HO-B. This list is not intended to cover every enhancement in coverage that is contained in the proposed Nationwide policy forms. If more detailed coverage information is desired, a side by side comparison of the Nationwide homeowners policy and the HO-B, a side by side comparison of the Nationwide condominium policy and the HO-B-CON, and a side by side comparison of the Nationwide tenant policy and the HO-BT are available from the Department on request.

A. Personal Property, Special Limits of Liability.

1. The Nationwide policy provides a $200 limit of liability for losses of money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins, stored value cards, smart cards, gift certificates, and medals. (See Section I-Property Coverages, Coverage C-Personal Property, Special Limits of Liability, item 6.) The HO-B provides a $100 limit of liability for losses of money. (See Section

1-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 1.)

2. The Nationwide policy provides a $1000 limit of liability for loss of securities, accounts, deeds, documents, evidences of debt, letters of credit, notes other than bank notes, passports, stamps and tickets.. (See Section I-Coverages, Coverage C-Personal Property, Special Limits of Liability, item 7.) The HO-B provides a $500 limit of liability for "Bullion/Valuable Papers". (See Section I-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 2.)

3. The Nationwide policy provides a $1000 limit of liability for watercraft and outboard motors, including trailers, furnishings, and equipment; and other utility type trailers while away from the residence premises. (See Section I-Coverages, Coverage C-Personal Property, Special Limits of Liability, items 10. and 11.) The HO-B excludes coverage for boats and boat trailers while away from the residence premises. (See Section I-Property Coverage, Property Not Covered, items 4. b. and 6.)

4. The Nationwide policy provides $1,000 coverage for loss by theft of jewelry, watches, furs, and precious and semi-precious stones. (See Section I-Coverages, Coverage C-Personal Property, Special Limits of Liability, item 1.) The HO-B provides a $500 limit of liability for loss by theft of gems, watches, jewelry or furs. (See Section I-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 3.)

B. Additional Property Coverages.

1. The Nationwide policy provides an additional 5% of the limit of liability for the damaged property for debris removal when the amount payable for the property loss plus debris removal expense exceeds the limit of liability for the damaged property. (See Section I-Property Coverages, Additional Property Coverages, item 1.) The HO-B's debris removal coverage is included in the limit of liability that applies to the damaged property and does not add additional coverage. (See Section I-Property Coverage, Coverage B (Personal Property), Extensions of Coverage, item 1.)

2. The Nationwide policy provides up to $500 for live tree debris removal. In the event of a loss by a covered peril, Nationwide will pay the reasonable expense incurred for the removal of live tree debris from the residence premises, that does not cause damage to covered property or covered structures. (See Additional Property Coverages, item 2.) The HO-B does not provide this coverage.

3. The Nationwide policy provides up to $500 for covered damage to any one tree, shrub or plant. (See Section I-Coverages, Additional Property Coverages, item 4.) The HO-B provides up to $250 for covered damage to any one tree, shrub or plant. (See Section I-Property Coverage, Coverage B (Personal Property), Extensions Of Coverage, item 4.)

The Nationwide policy provides up to $500 for fire department service charge for the insured's liability under contract or agreement for customary fire department charges. The HO-B does not provide similar coverage.

5. The Nationwide policy provides up to $1,000 for credit card, electronic fund transfer card, access device and forgery coverage for the legal obligation of an insured to pay theft or unauthorized use of credit cards, including electronic fund transfer cards or access devices, issued to or registered in an insured's name. (See Section 1-Coverages, Additional Property Coverages, item 7.) The HO-B provides a $100 limit of liability for loss by theft or unauthorized use of bank fund transfer cards. (See Section 1-Property Coverage, Coverage B (Personal Property), Special Limits of Liability, item 1.)

6. The Nationwide policy provides $100 coverage for lock replacement, with no deductible, if the keys to the residence premises are stolen. (See Section I-Coverages, Additional Property Coverages, item 11.) The HO-B does not provide similar coverage.

VII. Nationwide Homeowners Endorsements. In addition to the three proposed policy forms filed for adoption, Nationwide has filed thirteen endorsements for adoption pursuant to Article 5.35 (b). Since the proposed Nationwide policies contain notable restrictions in the water damage coverage and the dwelling foundation coverage as compared to the coverage contained in the HO-B, a general description of the coverage that will be provided by the proposed Nationwide Dwelling Foundation Endorsement and Water Damage Endorsement is provided. Additionally, a description of the coverage that will be provided by the proposed Nationwide Fungus (Including Mold) Limited Coverage Endorsement is provided.

A. Dwelling Foundation Endorsement.

The proposed endorsement provides coverage up to 15% of the amount of insurance for Coverage A-Dwelling for damage to the slab or foundation of the building, if the damage is caused by accidental discharge or leakage of water or steam, including constant or repeated seepage over a period of time from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance. The loss to the system from which the water or steam escaped is not covered. The tear out provisions include the cost of tearing out and replacing any part of the building necessary to repair or replace the plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance from which the water or steam escaped. The endorsement limits coverage to 15% of the amount of Coverage A-Dwelling on the date of loss. The dwelling foundation coverage applies only in the event of accidental discharge or leakage of water or steam, including constant or repeated seepage over a period of time and does not affect any coverage provided elsewhere in the policy. The loss to the system from which the water or steam escaped is not covered. The endorsement does not provide coverage for settling, cracking, shrinking, bulging, or expansion of pavements, patios, walls, floors, roofs, or ceilings whether caused directly or indirectly by accidental discharge or leakage of water including constant or repeated seepage or leakage of steam or water over a period of time from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, except as specifically provided in the Dwelling Foundation Endorsement, regardless of any other cause or event contributing concurrently or in any sequence to the loss. The endorsement further specifies that the exclusion in the policy for foundation damage caused by constant or repeated leakage or seepage of water or steam (Section I-Policy Exclusions) does not apply to the coverage provided in the Dwelling Foundation Endorsement.

B. Water Damage Coverage Endorsement.

The proposed endorsement provides coverage for direct physical loss consisting of water damage to property described in Coverage A - Dwelling, Coverage B - Other Structures, and Coverage C - Personal Property caused by the continuous or repeated seepage or leakage of water or steam from a heating, air conditioning or automatic fire protective sprinkler system; household appliances; or plumbing system. A plumbing system includes a shower pan, but does not include the shower stall or shower bath enclosure. The coverage includes the cost of tearing out and replacing any part of the building necessary to provide access to repair the system or appliance from which the seepage or leakage occurred. The endorsement does not provide coverage for fungus caused by continuous or repeated seepage or leakage of steam or water from a heating, air conditioning or automatic fire protective sprinkler system; household appliances; or plumbing system; loss caused by, consisting of, or resulting from

fungus; and loss to the system or appliance from which the water or steam escaped. The endorsement further specifies that Coverage C-Personal Property peril 12 (Section I-Perils Insured Against, item 12) concerning damage caused by constant or repeated leakage or seepage of water or steam is amended such that the exclusion for loss: (a) caused by water that backs up and enters through the sewers or drains, (b) due to continuous or repeated leakage or seepage of water or steam over a period of time; (c) due to freezing; and (d) to the system or appliance from which the water or steam escaped does not apply to the coverage provided in the Water Damage Endorsement.

C. Mold Coverage Endorsement.

The proposed endorsement provides coverage for remediation of fungus if the fungus is the result of a covered loss. The coverage includes remediation of the mold or fungus including the following costs to: (1) remove the fungus from covered property or to repair, restore, or replace that property; and (2) tear out and replace any part of the building or other property to as needed to gain access to the fungus. The coverage further includes the cost of any testing or monitoring of air or property to confirm the type, absence, presence, or level of fungus, whether performed prior to, during, or after remediation of covered property. The coverage further includes any loss of use or delay in rebuilding, repairing, or replacing covered property. The endorsement specifies that the mold or fungus that is the result of continuous or repeated seepage or leakage of water or steam from a heating, air conditioning or automatic fire protective sprinkler system; household appliances; or plumbing system and that is the result of a defect, weakness, inadequacy, fault, or unsoundness in planning; zoning; development; surveying; siting; design; specifications; workmanship; construction; grading; compaction; or materials used in construction, repair, or maintenance of any property or improvements whether on or off the residence premises is not covered. The fungus coverage applies only if the insurer receives immediate notice of the occurrence that resulted in the fungus and remediation begins as soon as possible and all reasonable means were used to save and preserve the property from further damage following a covered loss. The endorsement specifies that the most that Nationwide will pay under the policy for a mold loss in any one policy period is the Limit of Liability shown on declarations for the Fungus (Including Mold) Limited Coverage Endorsement regardless of :(1) of the number of covered losses that contribute to the resulting mold; or (2) the number of claims made during the policy period. The limits of liability available for mold or fungus coverage are 25%, 50%, or 100% of the Coverage A-Dwelling, Coverage B-Other Structures, and Coverage C-Personal Property limit of liability and includes any payments for Section I-Additional Property Coverages and Coverage D-Loss of Use.

VIII. Nationwide's Plan to Implement the Proposed Residential Property Policy Forms. Nationwide has informed the Department that when its proposed policy forms have been adopted, the proposed policy forms will be phased in for use with Nationwide policyholders while the policy forms promulgated by TDI will be discontinued for use with Nationwide policyholders. Nationwide has outlined the details of its plan to implement the proposed policy forms as follows:

A. New Business.

Once the proposed policy forms are adopted, Nationwide will write all new business on the proposed policy forms. The proposed policy forms limit coverage for dwelling foundation losses and water damage losses and exclude mold damage losses. At the time each new residential property policy is written, the applicant will be offered the Dwelling Foundation Endorsement, the Water Damage Endorsement, and the Fungus(Including Mold) Limited Coverage Endorsement subject to Nationwide's current underwriting guidelines. If a policyholder desires to continue the dwelling foundation coverage (subject to 15% of Coverage A-Dwelling), the water damage coverage, and the mold coverage that the policyholder essentially has under the HO-B, the Dwelling Foundation Coverage, Water Damage Coverage, and Mold Coverage endorsements must be purchased for an additional premium. The Dwelling Foundation Endorsement, the Water Damage Endorsement, and the Fungus(Including Mold) Limited Coverage Endorsement will be available for purchase at a later date subject to underwriting review.

B. Existing Business.

Nationwide will begin converting renewal business to the new forms as soon as new policy forms are adopted and implemented.

1. Homeowners-Form B (HO-B), Homeowners-Form C (HO-C). The HO-B's and HO-C's that are in force at the time of the conversion will be non-renewed and offered the Nationwide policy with the Dwelling Foundation Endorsement and Water Damage Endorsement attached. The renewal policy packet will contain a cover sheet message informing the consumer of information in the packet regarding the various policy changes. The information will include an explanation of the Dwelling Foundation Endorsement and Water Damage Endorsement with an offer to exclude the endorsements for a decrease in premium. The information will further include an explanation of the Fungus (Including Mold) Limited Coverage Endorsement with an offer to purchase this endorsement for an additional premium subject to underwriting. The endorsements will also be available for purchase at a later date subject to underwriting review.

2. Homeowners-Form A (HO-A). The HO-A's that are in force at the time of the conversion will be non-renewed and offered the Nationwide homeowners policy without the Water Damage Endorsement and Dwelling Foundation Endorsement attached. The renewal policy packet will contain a cover sheet message informing the consumer of information in the packet regarding the various policy changes. The information will include an explanation of the Water Damage Coverage, Dwelling Foundation Coverage, and Mold Coverage endorsements with an offer to purchase the endorsements for an additional premium. The endorsements will also be available for purchase at a later date subject to underwriting review.

3. Homeowners Tenant-Form B (HO-BT) and Homeowners Condo-Form B (HO-CON-B). The HO-BT's and HO-CON-B's that are in force at the time of the conversion will be non-renewed and offered the corresponding Nationwide policy with the Water Damage Endorsement attached. The renewal policy packet will contain a cover sheet message informing the consumer of information in the packet regarding the various policy changes. The information will include an explanation of the Water Damage Endorsement with an offer to exclude the endorsement for a decrease in premium. The information will further include an explanation of the Fungus (Including Mold) Limited Coverage Endorsement with an offer to purchase this endorsement for an additional premium subject to underwriting. The endorsements will also be available for purchase at a later date subject to underwriting review.

4. Consumer Disclosures. Nationwide agrees to provide an explanatory letter and a summary of coverages expressly noting where there is less coverage in the Nationwide policies than in the currently prescribed policies to the policyholders who are being converted from the currently prescribed Texas forms to the new Nationwide forms. This notice letter will be sent to the policyholders sixty (60) days in advance of the policy conversion date. This notice letter will be provided to the Department for its review prior to Nationwide's use of this letter.

C. Rating Information.

Nationwide agrees to file its initial rates and any rate changes for policies written through Nationwide Lloyds with the Department on an informational basis for a period of two years from implementation to allow the Department to monitor the rates on the new Nationwide policies. Nationwide also agrees to provide the Department with a copy of its loss cost analyses during the time period it is providing the rating information.

The Commissioner has jurisdiction of this matter pursuant to the Insurance Code, Articles 5.35 and 5.96.

A copy of the petition, including the exhibits with the full text of the proposed policy forms and endorsements and side by side comparisons of the proposed Nationwide homeowners policy and the HO-B, the proposed Nationwide condominium policy and the HO-B, and the proposed Nationwide tenants policy and the HO-B and a copy of the exempt filing notice are available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, side by side comparisons, and the exempt filing notice, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. P-0602-22).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the Texas Register, to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comments is to be submitted to Marilyn Hamilton, Associate Commissioner, Personal and Commercial Lines Division, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

TRD-200204956
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 31, 2002

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Texas Department of Insurance

Final Action on Rules

EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF AMENDMENTS TO TE 23 17, "TRUCKERS - INTERMODAL INTERCHANGE ENDORSEMENT (FORM UIIE-1)" IN THE TEXAS AUTOMOBILE RULES AND RATING MANUAL

The Commissioner of Insurance adopted amendments proposed by Staff to TE 23 17, "Truckers - Intermodal Interchange Endorsement (Form UIIE-1) in the Texas Automobile Rules and Rating Manual (the Manual). Staff's petition (Ref. A-0602-21-I) was published in the June 21, 2002 issue of the *Texas Register* (27 TexReg 5559).

Endorsement TE 23 17 is revised and renamed as "TE 23 17A, Truckers Uniform Intermodal Interchange Endorsement (IANA Form UIIE-1)." Several editorial changes are made, but the substantive change modifies and clarifies what the Motor Carrier's responsibilities are in regard to third party liability. Under the current endorsement, the "User" (Motor Carrier), "while in possession of interchange equipment, releases and agrees to defend, indemnify and hold harmless the Owner..." from loss arising out of the use of that equipment, "except loss or damage to such interchange equipment, or cargo being transported therein or cargo being loaded or unloaded or held at terminal or transit points incident to transportation."

The amendment removes the exception from liability set forth in the above provision, and the Motor Carrier accessing the premises of an intermodal facility for the purpose of picking up or dropping off intermodal equipment would assume the liability for its own activity at the time it enters the facility property. That liability time frame would be for "the Motor Carrier's: Use or maintenance of the equipment during an interchange period; the performance of this Agreement; and/or presence on the Facility Operator's premises."

The Manual's current Endorsement TE 23 17 is worded to conform to Form UIIE-1, which was developed by the Intermodal Transportation Association, which is now the Intermodal Association of North America (IANA). The new Endorsement TE 23 17A will conform to IANA Form UIIE-1, which is designed to replace Form UIIE-1. The letters "UIIE" refer to a Truckers Uniform Intermodal Interchange Endorsement.

IANA administers the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) that was revised effective September 1, 2000. According to IANA this standard contract is applicable generally between approximately 5,100 truckers/draymen and approximately 55 ocean and rail carriers, and it sets forth responsibilities of both the providing carrier of equipment and the receiving carrier of that equipment. Although the Department does not approve the agreement (UIIA), that document is referenced in proposed TE 23 17A in a similar manner to current TE 23 17's references to the predecessor agreement, Uniform Intermodal Interchange Contract (UIIC-1).

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. No. A-0602-21-I, which are incorporated by reference into Commissioner's Order No. 02-0770.

The Commissioner of Insurance has jurisdiction over this matter pursuant to Insurance Code Articles 5.06, 5.10, 5.96, and 5.98.

This notification is made pursuant to Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with Insurance Code Article 5.96(h), the Department will notify all insurers writing automobile insurance of this adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 30th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200204579
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 25, 2002

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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 speciÞed rules; and (3) notices of *readoption*, which summarize public comment to speciÞed rules. The complete text of an agencyís *plan to review* is available after it is Þled with the Secretary of State on the Secretary of Stateís web site (http://www.sos.state.tx.us/texreg). The complete text of an agencyís 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*** ofÞce.

Proposed Rule Reviews

Credit Union Department

Title 7, Part 6

The Texas Credit Union Commission will review and consider Chapter 93, §§93.101 (Scope: Definitions; Severability), 93.201 (Party Status), 93.202 (Computation of Time), 93.203 (Ex Parte Communications), 93.204 (Presiding Officer or Body), 93.205 (Notice of Hearing), 93.206 (Default), 93.207 (Service), 93.208 (Delegation of Authority), 93.209 (Subpoenas), 93.210 (Protective Orders; Motions to Compel), 93.211 (Administrative Record), 93.212 (Proposal for Decision), 93.301 (Finality and Request for SOAH Hearing), 93.302 (Referral to ADR), 93.303 (Hearings of Applications to Incorporate, Amend Bylaws, or Merge, or Consolidate), 93.304 (Appeals of Applications for Certificates of Authority), 93.305 (Appeals of all Other Applications for which no Specific Procedure is Provided by this Title), 93.401 (Appeals of Cease and Desist Orders and Orders of Removal), 93.402 (Stays), 93.501 (Request for Hearing to Appeal an Order of Conservation), 93.601 (Motion for Appeal to the Commission), 93.602 (Decision by the Commission), 93.603 (Oral Arguments before the Commission), 93.604 (Motion for Rehearing) and 93.605 (Final Decisions and Appeals) of Title 7, Part 6 of the Texas Administrative Code in preparation for the Credit Union Commission's Rule Review as required by Section 2001.39, Government Code.

Comments or questions regarding these rules may be submitted in writing to Isabel Velasquez, Executive Assistant, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or electronically to info@tcud.state.tx.us.

TRD-200204587
Harold E. Feeney
Commissioner
Credit Union Department
Filed: July 25, 2002

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Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 61, School Districts, pursuant to the Texas Government Code, §2001.039. The rules being reviewed in 19 TAC Chapter 61 are organized under the following subchapters: Subchapter A, Board of Trustees Relationship; Subchapter AA, Commissioner's Rules, Division 1, County Education Districts, and Division 2, School Finance; Subchapter BB, Commissioner's Rules on Reporting Requirements; Subchapter CC, Commissioner's Rules Concerning School Facilities; Subchapter DD, Commissioner's Rules Concerning Missing Child Prevention and Identification Programs; and Subchapter EE, Commissioner's Rules on Reporting Child Abuse and Neglect.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 61 continues to exist. The comment period begins with the publication of this notice and must last a minimum of 30 days.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 463-9701. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 475-3499.

TRD-200204618
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: July 26, 2002

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Adopted Rule Reviews

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 74, Curriculum Requirements, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 74 in the April 5, 2002, issue of the *Texas Register* (27 TexReg 2845).

The TEA finds that the reason for adopting continues to exist. One individual representing Reliant Energy HL&P Entex commented in support

of the rules. No changes are being proposed as a result of the review. This concludes the review of 19 TAC Chapter 74.

TRD-200204619
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: July 26, 2002

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The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 109, Budgeting, Accounting, and Auditing, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 109 in the May 24, 2002, issue of the *Texas Register* (27 TexReg 4593).

The TEA finds that the reason for adopting continues to exist. The TEA received no comments related to the rule review requirement as to whether the reason for adopting the rules continues to exist. The TEA is proposing amendments to 19 TAC §§109.1, 109.23, 109.25, 109.51 and 109.52, which may be found in the Proposed Rules section of this issue. This concludes the review of 19 TAC Chapter 109.

TRD-200204620
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: July 26, 2002

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §80.54(d)(4)

TABLE 3A: FOOTER CAPACITIES (LBS)

Soil Bearing Capacity

Footer size	1000psf	1500psf	2000psf	2500psf	3000psf	3500psf	4000psf
16x16x4	1700	2700	3500	4400	5300	6100	7000
20x20x4	2700	4100	5500	6900	8300	9400	11000
16x32x4	3500	5200	6800	8600	10400	12000	14000
24x24x4	4000	6000	8000	10000	12000	14000	16000

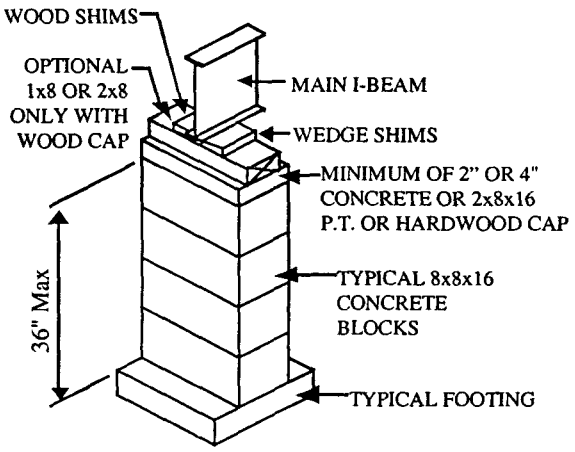
Notes:

1) 8x16x4 footers may be used for perimeter and/or exterior door supports. Capacity is half that of the tabulated values for a 16x16x4 footer. For double 8x16x4 footers use the 16x16x4 row.
2) Footers of material other than concrete may be used if approved by the department and the listed capacity and area is equal to or greater than the footer it replaces. Concrete footers of sizes not listed may be used as long as their size is equal to or greater than the size listed.
3) Footers with loads greater than 10,000 lbs. require a double stacked pier.
4) All poured concrete is minimum 2500 psi at 28 days.
5) Actual footer dimensions may be 3/8 inch less than the nominal dimensions for solid concrete footers conforming to the specifications in ASTM C90-99a, Standard Specification for Loadbearing Concrete Masonry Units.

Figure: 10 TAC §80.54(d)(6)

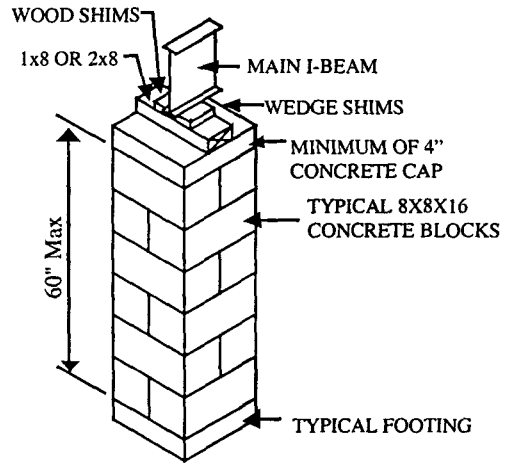
PIER DESIGN (SINGLE & MULTI-SECTION STACK)

PIER A



Pier A: Single stack of open cell, 8x8x16 concrete blocks. Maximum height is 36 inches as measured from the top of the footer to the top of the last concrete block. Concrete blocks are installed with their lengths perpendicular to the main I-Beam. Open cells must be vertical and in alignment.

PIER B



Pier B: Interlocked double stack of open cell 8x8x16 concrete blocks. The maximum height is 60 inches as measured from the top of the footer to the top of the last concrete block. The pier is capped with a minimum 16x16x4 concrete cap. Open cells must be vertical and in alignment. Each course of open cell blocks must be perpendicular to the previous course.

Note:

1) Open cell and solid concrete blocks shall meet ASTM-C90-99a, Standard Specification for Loadbearing Concrete Masonry Units.
2) Support system components are to be undamaged and installed in a manner to accomplish the purpose intended.
3) Either wood caps or shims must be used between I-Beam and concrete.

Figure: 10 TAC §80.54(d)(6)(C)

TABLE 3C: PIER LOADS (LBS) AT TABULATED SPACINGS (WITH PERIMETER SUPPORTS)

maximum I-Beam pier spacing

Unit width (ft)	4 ft o.c.	6 ft o.c.	8 ft o.c.	10 ft o.c.	12 ft o.c.
12 Wide	750	1150	1500	1900	2300
14 Wide	1050	1600	2100	2600	3100
16 Wide	1200	1800	2400	3000	3600
18 Wide	1450	2150	2850	3600	4300

Note: Maximum I-Beam pier spacing is 8 ft. o.c. for 8" I-Beam, 10 ft. o.c. for 10" I-Beam and 12 ft. o.c. for 12" I-Beam or the resultant maximum spacing based on soil bearing and footer size per Table 3A, whichever is less.

maximum perimeter pier spacing

Unit width (ft)	4 ft o.c.	5 ft o.c.	6 ft o.c.	7 ft o.c.	8 ft o.c.
12 Wide	1000	1200	1500	1700	1900
14 Wide	1100	1400	1650	1900	2200
16 Wide	1300	1600	1900	2250	2500
18 Wide	1600	2000	2300	2700	3000

Example: Determine maximum I-Beam pier spacing for a 16 ft. wide with 12" I-Beam, perimeter blocking and 1500 psf soil bearing capacity.

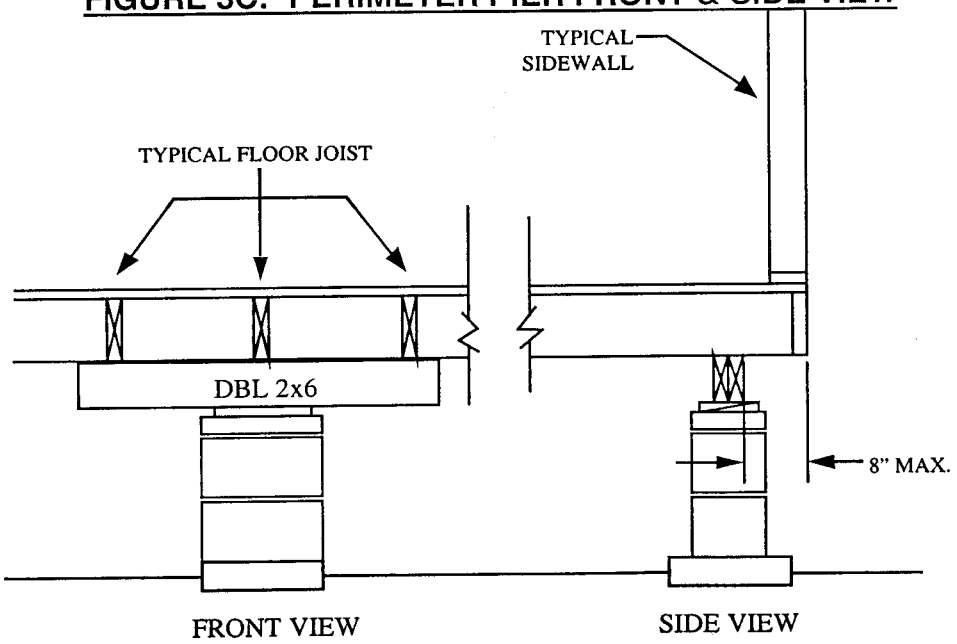
Step 1: From Table 3A, the maximum load for a 16x16x4 at 1500 psf soil is 2700 lbs.

Step 2: From Table 3C, the I-Beam pier load @ 10 ft. o.c. is 3000 lbs ==> no good
the I-Beam pier load @ 8 ft. o.c. is 2400 lbs ===> ok

I-Beam pier spacing is at 8 ft. o.c.

Step 3: The perimeter pier load @ 8ft. o.c. is 2500 lbs ====> ok
Perimeter pier spacing is at 8 ft. o.c.

FIGURE 3C: PERIMETER PIER FRONT & SIDE VIEW

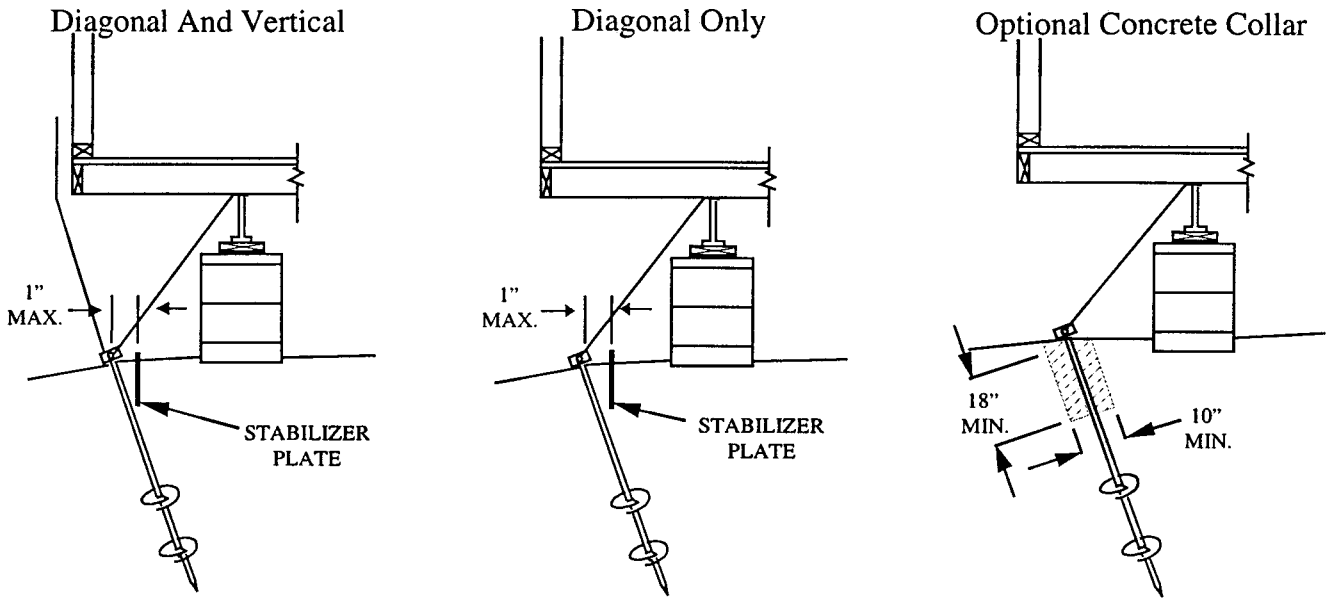


Notes:

1) Perimeter pier may be inset from edge of floor up to 8". The 2x6 brace may be omitted if the front face of a perimeter pier is flush with the perimeter joist and the perimeter pier supports the intersection of an interior joist and perimeter joist.
2) Dbl 2x6 are min. #3 Yellow Pine or pressure treated Spruce-Pine, nailed together with min. 16d nails 2-rows at maximum 8" o.c.
3) 2x6 brace must span at least two (2) but not more than three (3) floor joists.

Figure: 10 TAC §80.55(c)(2)

PLACEMENT OF STABILIZING PLATES



Notes:

1) Stabilizer plate may be replaced with concrete collar that is at least 18 inches deep and 10 inches in diameter.
2) Diagonal tie must depart from the top of the I-Beam as shown.
3) The top of the stabilizer plate must be within 1 inch of the anchor shaft.
4) Stabilizer plates must be installed in accordance with the plate manufacturer's instructions.

Figure: 10 TAC §80.55(d)(2)

WIND ZONE I ONLY!

Minimum Nominal Widths Single/Double Section				
Max. Vertical Distance	**12/24 wide**	**14/28 wide**	**16/32 wide**	**18/36 wide**
20" to 24"	11 ft	14 ft	15 ft	16 ft
25" to 29"	9 ft	12 ft	14 ft	15 ft
30" to 40"	8 ft	10 ft	12 ft	14 ft
41" to 48"	7 ft	9 ft	11 ft	13 ft
49" to 60" (see note 3)	6 ft	8 ft	10 ft	12 ft
61" to 80" (see note 3)	5 ft	6 ft	8 ft	10 ft
Minimum number of longitudinal ties, each end of each section.	1 at min. 58° angle from vertical	2 at min. 32° angle from vertical	2 at min. 38° angle from vertical	2 at min. 46° angle from vertical

Notes:

1) This chart applies to single and multi section homes.
2) Anchoring components are rated at 4725 lbs. ultimate load. Anchoring components and equipment shall be installed in accordance with the anchoring component and equipment manufacturer's installation instructions or the generic standards in §80.55(d)(4).
3) Single section units shall have diagonal ties directly opposite each other along the two main I-beams. Multi section units need diagonal ties on the outer-most main I-beam only. When vertical distance exceeds 48", connect diagonal tie to opposite beam.
4) Ties installed at each end of the home shall be within 24 inches of each end of the applicable I-beam.
5) The distance between any two ties may be exceeded to avoid an obstruction, as long as the total number of ties remains the same, and no two anchors shall be within 4 ft of each other. See table 4B.
6) Any vertical ties present on homes must be attached to a ground anchor. Both vertical and diagonal ties may be connected to a single double-headed anchor, when the anchor is approved for the combined loading.
7) The vertical distance is measured from the anchor head to the underside of the floor joists.
8) No two anchors shall be within 4 ft of each other.
9) Other approved stabilizing systems may replace longitudinal ties. Follow approved installation instructions.

Figure: 10 TAC §80.55(d)(3)

TABLE 4B: MINIMUM NUMBER OF DIAGONAL TIES

WIND ZONE I ONLY

	o.c. spacing (ft)												
unit length (ft)	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	**14**	**15**	**16**
40	10	8	7	6	6	5	5	4	4	4	4	3	3
42	11	9	7	6	6	5	5	5	4	4	4	4	3
44	11	9	8	7	6	5	5	5	4	4	4	4	4
46	12	9	8	7	6	5	5	5	5	4	4	4	4
48	12	10	8	7	7	6	5	5	5	4	4	4	4
50	13	10	9	8	7	6	6	5	5	5	4	4	4
52	13	11	9	8	7	6	6	5	5	5	4	4	4
54	14	11	9	8	7	7	6	6	5	5	5	4	4
56	14	11	10	8	8	7	6	6	5	5	5	4	4
58	15	12	10	9	8	7	6	6	6	5	5	5	4
60	15	12	10	9	8	7	7	6	6	5	5	5	5
62	16	13	11	9	8	7	7	6	6	5	5	5	5
64	16	13	11	10	9	8	7	6	6	6	5	5	5
66	17	13	11	10	9	8	7	7	6	6	5	5	5
68	17	14	12	10	9	8	7	7	6	6	6	5	5
70	18	14	12	10	9	8	8	7	7	6	6	5	5
72	18	15	12	11	10	9	8	7	7	6	6	6	5
74	19	15	13	11	10	9	8	7	7	6	6	6	5
76	19	15	13	11	10	9	8	8	7	7	6	6	6

Note: If unit length is not listed use next higher tabulated length.

Figure: 10 TAC §80.55(e)(1)

TABLE 5A: MAXIMUM SPACING FOR DIAGONAL TIES
PER SIDE OF THE ASSEMBLED UNIT

Minimum Nominal Widths Single/Double Section				
Max. Vertical Distance	**12/24 wide**	**14/28 wide**	**16/32 wide**	**18/36 wide**
20" to 24"	7 ft	8 ft	8 ft	8 ft
25" to 29"	6 ft	7 ft	8 ft	8 ft
30" to 40"	5 ft	6 ft	7 ft	8 ft
41" to 48"	4 ft	5 ft	6 ft	7 ft
49" to 60" (see note 3)	4 ft	6 ft	6 ft	6 ft
61" to 80" (see note 3)	4 ft	4 ft	4 ft	4 ft
Minimum number of longitudinal ties, each end of each section.	2 at min. 58° angle from vertical	2 at min. 32° angle from vertical	3 at min. 38° angle from vertical	3 at min. 46° angle from vertical

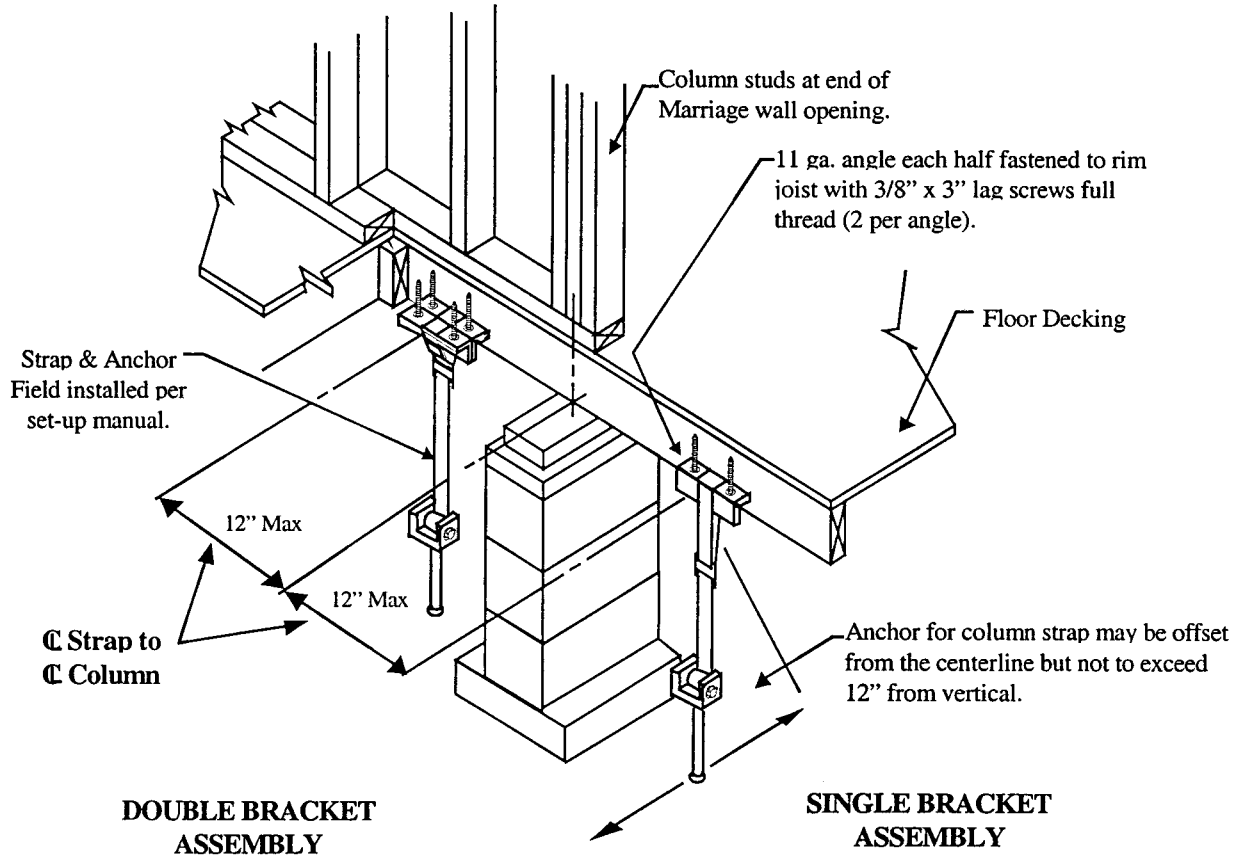
Notes:

1) This chart applies to single and multi section homes.
2) Anchor components are rated at 4725 lbs. ultimate load.
3) Single section units shall have diagonal ties directly opposite each other along the two main I-beams. Multi section units need diagonal ties on the outer-most main I-beam only. When vertical distance exceeds 48", connect diagonal tie to opposite beam.
4) Ties installed at each end of the home shall be within 24 inches of each end of the applicable I-beam.
5) The distance between any two ties may be exceeded to avoid an obstruction, as long as the total number of ties remains the same, and no two anchors shall be within 4 ft of each other. See table 4B.
6) Any vertical ties present on homes must be attached to a ground anchor. Both vertical and diagonal ties may be connected to a single double-headed anchor, when the anchor is approved for the combined loading.
7) The vertical distance is measured from the anchor head to the underside of the floor joists.
8) No two anchors shall be within 4 ft of each other.
9) Other approved stabilizing systems may replace longitudinal ties. Follow approved installation instructions.

Figure: 10 TAC §80.55(f)(4)

TYPICAL INSTALLATION DETAILS

Figure 5B



Note: Anchors, straps, buckles and crimps shown are for illustration purposes only. All components used must be approved by the department.

Figure: 10 TAC §80.55(f)(6)(D)

LONGITUDINAL TIES

Figure 1

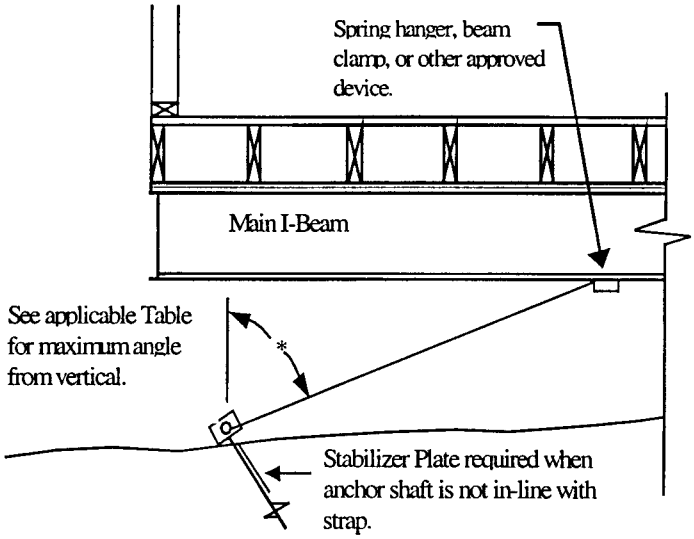


Figure 1: Connection to existing spring hangers, factory installed or site installed beam clamps.

Figure 2

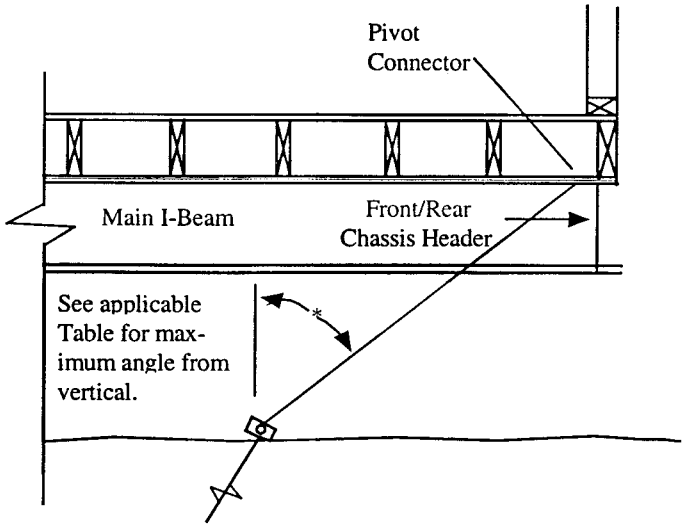


Figure 2: Connection to front or rear chassis headers. Strap must be installed within 12" of where the header member connects to the main I-beam.

Figure: 19 TAC §109.51(b)

BID FORM FOR ACTING AS DEPOSITORY FOR ALL FUNDS

Board of Trustees
_____Independent School District
_____
_____

Board Members:

In accordance with your bid notice, the undersigned, a state or national banking corporation, hereinafter called Bidder, for privilege of acting as Depository for ALL funds of the _____ Independent School District, of _____, Texas, hereinafter called the District, for a term of two years beginning [~~September 1,~~] _____, and ending [~~August 31,~~] _____ or until such time as a successor Depository is selected and qualified agrees to:

A. Pay interest on funds of the District placed on interest-bearing time deposits with maturities as shown below. Please provide basis points above, below or equal to the "asked" rate on the T-Bill closest to the maturity date of the time deposit being purchased as reported in the Wall Street Journal.

Single Maturity Time Deposits of more than $100,000:

MATURITY	Basis point spread over(+)/under(-) T-Bill "asked" rate
7 -- 29 Days	_____
30 -- 59 Days	_____
60 -- 89 Days	_____
90 -- 179 Days	_____
180 -- 364 Days	_____
365 Days or More	_____

B. All District Checking Accounts: All checking accounts as outlined on the Attachment to the bid notice will be maintained by a compensating balance by the District. A major portion of these balances will be invested in those investments permitted by the Government Code, Chapter 2256, Public Funds Investment. The excess collected balances will be moved daily by the bidder on instructions from the District into, or out of, any overnight type of investment secured by U. S. Government securities, as approved by the Depository Bank and the District. Please indicate below your recommendations as to the type of overnight investment and projected yield:

INVESTMENT	YIELD
_____	_____
_____	_____
_____	_____

C. In addition to the investments previously outlined, the District reserves the right to purchase, sell and invest its funds and funds under its control as authorized by the Government Code, Chapter 2256, Public Funds Investment, and in compliance with the district's investment policy**.** A copy of the District's Investment Policy is attached.

D. The District will maintain balances in the checking accounts to compensate the bank in full or in part for services provided. Earnings credit for these balances should be reflected on the monthly account analysis provided to the District by applying the earnings credit rate (ECR) to the average investable balance in the account for the month. The ECR should be based on the average 91-day Treasury Bill auction rate or other average money market rate for the analysis month.

1. Please specify the Bank's method of calculating monthly earnings credit. Please include the definition of balances on which earnings are applied (example: collected balance before or after reserves), as well as the money market interest rate basis for the ECR and the money market rate period (current month, previous month) used for calculation.

2. Please provide the Bank's ECR for the most recent three months.

3. If the checking accounts will be interest bearing, please explain how interest earned during the month on the account balance would be reflected on the monthly account analysis.

E. If the district sells bonds, the District reserves the right to invest these monies as allowed by law.

F. The District desires the services shown on the following pages. Please indicate which services would be included in a compensating balance and also indicate the per unit charge associated with each item. The Depository Bank will provide the following services, as indicated on the following pages, for the compensation shown.

SERVICE	CAN BE INCLUDED IN COMPENSATING BALANCE (YES) (NO)	DIRECT FEE OR SERVICE CHARGE
Account Maintenance	_____	_____
Deposits/Credits Posted	_____	_____
Items Deposited Encoding Charge	_____	_____
Clearing Charge	_____	_____
Debits/Checks Paid	_____	_____
Arrange Canceled Checks in Numerical Sequence	_____	_____
Return Items - Recleared	_____	_____
Return Items - Charged back	_____	_____
Stop Payment	_____	_____
Daily Balance Reporting Via Telephone	_____	_____
Via Fax	_____	_____
Cash Deposit Processing	_____	_____
Coin Counting & Wrapping Service	_____	_____
Rolls of Coin/Straps of Currency Purchased	_____	_____
Wire Transfers Outgoing	_____	_____
Incoming	_____	_____
Mail Advices	_____	_____
Telephone Transfers Between Accounts	_____	_____
Insufficient Funds Items	_____	_____
CPA Confirmations	_____	_____

SERVICE	CAN BE INCLUDED IN COMPENSATING BALANCE (YES) (NO)	DIRECT FEE OR SERVICE CHARGE
Cashier's Checks	_____	_____
FDIC Insurance	_____	_____
Research/Statement Reproduction	_____	_____
Collateral Fee	_____	_____
Detailed monthly collateral report at market value	_____	_____
One Safe Deposit Box (Size:)	_____	_____
Night depository services ____ Locking bank bags and ____ Night drop keys	_____	_____
Safekeeping services for any book-entry securities purchased by the District	_____	_____
Cash management advice on a semiannual basis	_____	_____
Preparation of monthly bank statement beginning with first day of month and ending with the last day of month, showing debits, credits and balances of each separate account and sequential listing of cashed checks within five working days of closing date.	_____	_____
Monthly account analysis statement	_____	_____
Deposit Slips	_____	_____
Coin wrappers and currency straps	_____	_____
Endorsement Stamps	_____	_____

Based on the above bank charges, please complete the attached pro forma account analysis utilizing the average ledger balance, collected balance and service volumes listed. Use your bank's reserve requirement and earning credit rate percentages that were in effect for government entities for the month of _____, _____.

G. For those banks that do not want to base cost of services on a fee basis that is determined by the pro forma account analysis, please indicate below the monthly checking account balance required to compensate the bank for the volume of services required by the district as listed on the account analysis form (Net Monthly Earnings/Expense Computation) and the method for computing the required monthly checking account balance.
$_____

H. Funds availability:

1. Please include a copy of your current availability schedule.

2. What is your daily cut-off time for same day ledger credit on deposits?

3. Explain how float is calculated.

I. Although the District does not intend to have a net overdraft position throughout the course of the contract, please state the Bank's policy on overnight overdrafts and daylight overdrafts.

J. If the Depository elects to file with the District a corporate surety bond in an initial amount equal to the estimated highest daily balance of District funds determined by the Board of Trustees of the District to be on deposit with Depository during the term of this Depository Contract, then a fully executed copy of such corporate surety bond in the amount of $_____, in the form and with the content prescribed by State Board of Education rule will be required; provided further, that:

1. that the initial amount of the corporate surety bond may rise or fall from day to day so long as all deposits of the District are fully and wholly protected;

2. the bond is made payable to the school district and is signed by the depository bank and the surety company authorized to do business in this state;

3. the bond and the surety on the bond are approved by the board of trustees of the school district; and

4. the bond is conditioned on:

(a) the faithful performance of all duties and obligations devolving by law on the depository;

(b) the payment on presentation of all checks or drafts on order of the board of trustees of the school district, in accordance with its orders entered by the board of trustees according to law;

(c) the payment on demand of any demand deposit in the depository;

(d) the payment, after the expiration of the period of notice required, of any time deposit in the depository;

(e) the faithful keeping of school funds by the depository and the accounting for the funds according to law; and

(f) the faithful paying over to the successor depository all balances remaining in the accounts.

K. If the Depository does not elect to furnish the corporate surety bond, then the Depository shall have the option of either depositing or pledging with the District, or with a trustee designated by the District, approved securities as defined in section 45.201 of the Education Code, in an amount at market value sufficient to adequately protect the funds of the District on deposit with Depository from day to day during the term of this proposal, provided that:

1. the approved securities shall be of the kind defined in the Texas Education Code and the amount pledged shall be in a total market value sufficient to adequately protect the funds of the District as directed at anytime by the Board of Trustees of the District in accordance with standards acceptable to the Texas Education Agency;

2. the pledge of approved securities shall be waived only to the extent of the exact dollar amount of Federal Deposit Insurance Corporation insurance protection for the funds of the District on deposit with the Depository from day to day, and in the event of any termination of such insurance protection this proposal shall immediately become void except as provided in 4. hereinafter;

3. the conditions of the pledge of approved securities required by this proposal are that the Depository shall faithfully perform all duties and obligations devolving upon the Depository by law and this proposal, pay upon presentation all checks or drafts drawn on order of the Board of Trustees of the District in accordance with its orders duly entered according to the laws of Texas, pay upon demand any demand deposit of the District in the Depository, pay any time deposit or certificate of deposit of the District in the Depository upon maturity or after the period of notice required, and faithfully keep, account for as required by law, and faithfully pay over, at maturity or on demand as the District may elect, to any successor depository all balances of funds of the District then on deposit with the Depository;

4. the pledge of approved securities required by this proposal shall be a continuing pledge, ceasing only upon the later of the termination of a contract or the fulfillment by the Depository of all of its duties and obligations arising out of a contract, and a continuing security interest in favor of the District shall attach immediately upon any such pledge to all proceeds of sale and to all substitutions, replacements, and exchanges of such securities, and in no event shall such continuing security interest be voided by an act of the Depository; but notwithstanding the foregoing, the Depository shall have the right, with the consent of the District, to purchase and sell, and substitute or replace, any and all of the approved securities pledged pursuant to this contract with other approved securities, provided that all of the other conditions of this proposal are adhered to by the Depository, and such pledge shall be in addition to all other remedies available in law to the District;

[~~5. a contract shall become binding upon the District and the Depository only upon acceptance by the Texas Education Agency of the contract and the bid attached thereto, and the pledge of approved securities shall be evidenced to the Texas Education Agency by photocopies of safekeeping pledge to the District and the par value of the pledged securities at the date pledged;~~]

5. [~~6.~~] the Depository shall immediately furnish or cause to be furnished to the District original and valid safekeeping or trust receipts issued by the bank holding the approved securities pledged pursuant to the contract, marked by the holding institution on their face to show the pledge and par value as required above and provide District with the current market value of each security pledged; [~~. The District shall promptly furnish all executed copies of the contract, photocopies of all such receipts, and photocopies of new receipts for substitutions and additions and written notice of deletions, when made, to the Texas Education Agency, School Financial Audits Division, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701, for acceptance by the Texas Education Agency;~~]

6. the records of the Depository and/or the custodian of the securities pledged by the Depository may be subject to audit at any time, in accordance with Gov. Code 2257.061, Audits and Examinations by the Texas Education Agency, School Financial Audits Division, William B. Travis Building, 1701 N. Congress, Austin, Texas 78701;

[~~7. venue for any litigation arising from a contractual dispute between a Depository and the ISD shall be in the county in which the ISD has its central office, provided that this venue designation shall not be deemed a waiver of any immunity which either party hereto may be entitled to claim; and~~]

7. [~~8.~~] upon any closing or failure of Depository or any event deemed by a state or federal regulatory agency to constitute a closing or failure of depository, title to all securities pledged pursuant to this depository contract shall be deemed to be vested in, and be held by the District, and the District is hereby empowered to take immediate possession of and to sell any and all of such pledged securities, whether in safekeeping at another bank or in possession of the District or the Depository, and the District is specifically so empowered by execution of this contract; and [~~.~~]

8. [~~9.~~] the collateral pledge agreement shall conform to the United States Code Annotated (USCA), Title 12, §1823(e), so to defeat the claim of the Federal Deposit Insurance Corporation, its successor, or any other receiver to the securities.

L. Venue for any litigation arising from a contractual dispute between a Depository and the ISD shall be in the county in which the ISD has its central office, provided that this venue designation shall not be deemed a waiver of any immunity which either party hereto may be entitled to claim.

M. [~~L.~~] What is the maximum dollar amount of collateral your institution will provide for deposits belonging to the school district?_____

N. [~~M.~~] Does the financial institution collateralize deposits of the district based on ledger or collected balances?_____

O. [~~N.~~] Please provide the following additional information:

1. State full name and address of your company and parent company if you are a subsidiary. Proposing bank shall include a list of branch locations within the district boundary.

2. Enclose annual audited financial operating statements for the past year, plus a call report of the most recent operating quarter. Members of bank holding companies include corporate annual financial statements and your individual bank's call report for the most recent operating quarter. Additional data may be requested, if necessary.

3. The district will require the selected depository to designate a bank officer as a primary contact with the school district.

Name_____
Telephone # _____

4. A pre-award interview may be conducted on site at the respective offeror's location during evaluation and prior to contract award. Please provide the District with a contact name and telephone number for arranging the pre-award interview.

5. Provide a statement of any current or potential conflicts of interest.

6. Please attach a list of any other services your Bank can render for the District. Often bids are so nearly identical that additional banking services, such as short term loans to the District or services rendered without cost to the District, can be a determining factor in the awarding of the contract. Items listed in this section should relate to the District only. Services to employees or individuals associated with the District cannot be taken into consideration.

P. [~~O.~~] This bid was requested by the District and is made by Bidder with the expressed agreement and understanding that District reserves the right to reject any and/or all bids and the further right that if any portion or provision of this bid and/or any contract between Bidder and District entered into by virtue thereto is invalid, the remainder of this bid and/or resulting contract at the option of the District shall remain in full force and effect, and not be affected by said invalid portion or provision.

Q. [~~P.~~] Attached hereto is a Cashier's Check in the sum of $_____ payable to the District. If this bid to be Depository of all District funds or to be Depository of only a designated amount of said funds is accepted, said check is to secure the performance of said bid, and if Bidder fails to enter into a contract with District as provided in this bid, then said check shall be cashed by District as liquidated damages for said failure. If the Bidder enters into a contract with the District, the District shall return the check to the Bidder. In the event this bid is not accepted, the check is to be returned to the Bidder immediately after the contract award is made.

R. [~~Q.~~] the District shall be allowed by the Depository to purchase time deposits which mature after the ending date of the depository contract; however, the Depository may apply new interest rates to the time deposits after the ending date of this contract. The District shall be entitled to withdraw these time deposits without penalty at the expiration of the depository contract, but in that event, the Depository shall only be obligated to pay interest rates comparable to rates paid for the term the time deposits were actually held; provided, however, that the Depository may impose an early withdrawal penalty on a time deposit withdrawn within 6 days of creation of the deposit, to the extent required to comply with federal regulations defining time deposits.

S. The ISD and the Depository may agree to extend this contract for one additional two-year term in accordance with Section 45.205 of the Education Code. An extension under this subsection is not subject to the requirements of Section 45.206 of the Education Code.

T. Section 45.205 of the Education Code requires that this contract and any extension of this contract coincide with the ISD's fiscal year. In the event the ISD changes fiscal year in accordance with Section 44.0011 of the Education Code, the term of the contract may be shortened or extended no more than one year by agreement of the parties to coincide with the end of the new fiscal year, provided that this contract is to remain in effect until its successor is selected and has qualified. If the parties cannot agree, the ISD may at its option change the term of this contract to coincide with the end of a new fiscal year closest to its original expiration date.

U. This contract and/or an additional two-year extension of this contract and the bid attached hereto shall become binding upon the ISD and the Depository only upon acceptance by the Texas Education Agency.

Dated this the _____ day of _____, _____

BIDDER:

BY: (signature of authorized bank officer***)***

TITLE:

ADDRESS: TELEPHONE NUMBER:

NET MONTHLY EARNINGS/EXPENSE COMPUTATION

_____ISD _____, _____

_____ Account *Date*

AVERAGE LEDGER BALANCE	$_____
LESS: AVERAGE FLOAT	_____
EQUALS AVERAGE COLLECTED BALANCE	$_____
LESS: RESERVE REQUIREMENT @ _____%	_____
EQUALS INVESTABLE BALANCE	_____
X EARNINGS CREDIT RATE @ _____%	_____
EQUALS NET MONTHLY EARNINGS CREDIT	$_____

ACTIVITY SERVICE CHARGES

PROCESSING SERVICES	***AVERAGE PROJECTED MONTHLY VOLUME/UNITS***	***MONTHLY UNIT PRICE***	**TOTAL *ESTIMATED MONTHLY SERVICE CHARGE***
Account Maintenance	_____	$_____	$_____
Bank Statement	_____	_____	_____
Deposits/Credit Posted	_____	_____	_____
Items Deposited:			
Encoding Charge	_____	_____	_____
Clearing Charge	_____	_____	_____
Debits/Checks Paid	_____	_____	_____
Returned Item - recleared	_____	_____	_____
Returned Item - charged back	_____	_____	_____
Check Serial Sort:			
Per Account	_____	_____	_____
Per Item	_____	_____	_____
Wire Transfer:			
Incoming Wire	_____	_____	_____
Outgoing Wire	_____	_____	_____
Mail Advice	_____	_____	_____
Telephone Transfer Between Accounts	_____	_____	_____
Stop Payment	_____	_____	_____
Daily Balance Reporting	_____	_____	_____
Cash & Currency Processing:			
Currency Deposited	_____	_____	_____
Coin Deposited	_____	_____	_____
Currency Straps Purchased	_____	_____	_____
Coin Rolls Purchased	_____	_____	_____
Collateral Charge	_____	_____	_____
FDIC Insurance Charge	_____	_____	_____
Other Charges:			
_____	_____	_____	_____
TOTAL SERVICE CHARGE			**$_____**
NET EXCESS/(DEFICIT)			**$_____**
TOTAL COMPENSATING BALANCE REQUIRED FOR SERVICES			**$_____**
* **NET BALANCES AVAILABLE FOR OTHER SERVICE OR**			**$_____**
SERVICE CHARGE DUE FOR PERIOD			**$_____**

***** Please attach the formula used to determine the net balances available for other services.

ELECTRONIC BANKING PRODUCTS

Insert the following 3 pages only if your district is currently using electronic banking products or if you anticipate using some or all of these products during the upcoming depository contract.

ELECTRONIC BANKING PRODUCTS

Please attach explanations pertaining to the following questions relating to electronic bank products.

1. WIRE TRANSFERS

Is a personal computer access system available for initiating wire transfers?

Does the system allow initiation of repetitive and non repetitive transfers?

Is a secondary authorization security feature available?

At what time is the system accessible each day?

What procedures are in place in case of system failure?

What systems are in place to confirm receipt of incoming wires?

What other features are available through the system?

Can the cost of the service be included in compensating balances?

What is the cost of the service? How do these prices compare to telephone initiated wire transfers?

	Via Computer	Via Telephone/Fax
Monthly Maintenance	_____	_____
Line Access Charge	_____	_____
Outgoing Repetitive	_____	_____
Outgoing Non-Repetitive	_____	_____
Repetitive Internal Transfer	_____	_____
Non-Repetitive Internal Transfer	_____	_____
Other Charges:		
_____	_____	_____
_____	_____	_____
_____	_____	_____

2. STOP PAYMENTS

Is a personal computer access system available for initiating stop payments?

Does the system notify the user that a check has already been paid? If so, when?

At what time is the system accessible each day?

How is receipt of a stop payment order confirmed?

How long do stop payments remain in effect?

Can the cost of the service be included in compensating balances?

What is the cost of the service? How does this cost compare to telephone/written instructions?

	Via Computer	Via Telephone/Fax
Monthly Maintenance	_____	_____
Line Access Charge	_____	_____
Stop Payment Orders	_____	_____
Stop Payment Deletions	_____	_____
Other Charges:		
_____	_____	_____
_____	_____	_____
_____	_____	_____

3. BALANCE REPORTING

Is a personal computer access system available for balance reporting?

What information is available on the system? Attach a sample report. How does this information compare to what is available via telephone balance reporting?

At what time is the system accessible each day? What procedures are in place in case the system is down? How many days has the system been down in the past 3 months?

Can the cost of the service be included in compensating balances?

What is the cost of the service? How does this compare to telephone balance reporting?

	Via Computer	Via Telephone/Fax
Monthly Maintenance	_____	_____
Line Access Charge	_____	_____
Per Account	_____	_____
Per Debit/Credit Reported	_____	_____
Other Charges:		
_____	_____	_____
_____	_____	_____
_____	_____	_____

4. DIRECT DEPOSIT OF PAYROLL

Does your system support tape input? Personal computer input? Mainframe transmission?

What file format is required?

Where must tapes be delivered? What is the deadline to receive tapes for a Friday payroll?

What is the deadline for a Friday payroll for personal computer transmission? For mainframe transmission?

What is involved with correcting items? Stop payments?

Can the cost of the service be included in compensating balances?

What is the cost of the service?

Monthly Maintenance	_____
Input:	
Tape	_____
Personal Computer Transmission	_____
Mainframe Transmission	_____
Vendor	_____
ACH Credit -- two day item	_____
ACH Debit -- two day item	_____
Delete/Reversal (Stop Payment)	_____
Return Item	_____
Return Item Reclear	_____
Return Item Notification	_____
Other Charges:	
_____	_____
_____	_____

5. ACCOUNT RECONCILIATION

Do you offer tape, floppy disk, or direct data transmission output?

Do you offer full reconciliation (i.e., do you accept a tape of paid items)?

Are checks sorted in check number order as part of the reconciliation service?

What file format is required?

How soon after month-end is reconciliation available?

Can the cost of the service be included in compensating balances?

What is the cost of the service?

Partial Account Reconciliation	
Monthly maintenance	_____
Per item	_____
Serial sort	_____
Output:	
Tape	_____
Personal computer transmission	_____
Mainframe transmission	_____
Full Account Reconciliation	
Monthly maintenance	_____
Per item	_____
Serial sort	_____

Figure: 19 TAC §109.52(b) ___-___ BIENNIUM

DEPOSITORY CONTRACT FOR FUNDS
OF INDEPENDENT SCHOOL DISTRICTS
UNDER TEXAS EDUCATION CODE, CHAPTER 45, SUBCHAPTER G,
SCHOOL DISTRICT DEPOSITORIES

STATE OF TEXAS)

COUNTY OF _____)

_____
County-District Number

_____
Bank Routing Number

ARTICLE I. _____, hereinafter referred to as the
Name of Depository Bank
"Depository," located at _____ _____County,
Address, City, Zip Code *Name of County*
State of Texas, being a bank as that term is defined in section 45.201 of the Texas Education Code, hereinafter referred to as "the Code", was duly selected in accordance with Chapter 45, Subchapter G of the Code, by the Board of Trustees of the _____ Independent School
Name of District
District located in _____ County, Texas, hereinafter referred to as the "ISD," to serve
Name of County
as the Depository (or in the event of tie bids as defined in the Code, as one of the Depositories) of the school funds of the ISD, except those school funds permitted by law to be deposited or invested otherwise at the sole discretion of the Board of Trustees of the ISD. The action of the Board of Trustees of the ISD was duly taken and the Depository is to serve pursuant to this contract for a period of two years and until its successor is selected and has qualified beginning [~~September 1,~~] _____ and ending [~~August 31,~~] _____, unless sooner terminated by Depository's failure to adhere to all requirements of the Code and of this contract. Said action was a result of bids opened on _____. Depository's being the best, or equal to
Date
the best, bid selected from_____bids submitted to the ISD.
number submitted

ARTICLE II. Such selection by the ISD was made on the basis of a written bid tendered by Depository substantially in the form prescribed by State Board of Education rule, a copy of which bid is attached hereto and made a part hereof by reference. This contract is subject to the Code and any amendments thereto and to any and all acts of the Texas legislature which affect public monies held by the ISD during the term of this contract.

ARTICLE III.

A. If the Depository elected to file with the ISD a corporate surety bond in an initial amount equal to the estimated highest daily balance of the ISD funds determined by the Board of Trustees of the ISD to be on deposit with Depository during the term of this Depository Contract, then a

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fully executed copy of such corporate surety bond in the amount of $_____in the form and with the content prescribed by State Board of Education rule is attached hereto and made a part hereof by reference; provided further, that:

(1) the initial amount of the corporate surety bond may rise or fall from day to day so long as all deposits of ISD are fully and wholly protected;
(2) the bond is made payable to the school district and is signed by the depository bank and the surety company authorized to do business in this state;
(3) the bond and the surety on the bond are approved by the board of trustees of the school district; and
(4) the bond is conditioned on:
    (a) the faithful performance of all duties and obligations devolving by law on the depository;
    (b) the payment on presentation of all checks or drafts on order of the board of trustees of the school district, in accordance with its orders entered by the board of trustees according to law;
    (c) the payment on demand of any demand deposit in the depository;
    (d) the payment, after the expiration of the period of notice required, of any time deposit in the depository;
    (e) the faithful keeping of school funds by the depository and the accounting for the funds according to law; and
    (f) the faithful paying over to the successor depository all balances remaining in the accounts.

B. If the Depository did not elect to make the corporate surety bond in the amount and as referred to in A, above, then the Depository shall have the option of either depositing or pledging with the ISD, or with a trustee designated by the ISD, approved securities as defined in section 45.201 of the Code, in an amount at market value sufficient to adequately protect the funds of the ISD on deposit with Depository from day to day during the term of this contract, provided that:
    (1) the pledged securities shall be approved securities and authorized by law and shall be in a total market value sufficient to adequately protect the funds of the ISD on deposit as directed at anytime by the ISD in accordance with standards acceptable to the Texas Education Agency;
    (2) the pledge of approved securities shall be waived only to the extent of the exact dollar amount of Federal Deposit Insurance Corporation insurance protection for the funds of the ISD on deposit with the depository from day to day, and in the event of any termination of such insurance protection this contract shall immediately become void except as provided in (4) hereinafter;
    (3) the conditions of the pledge of approved securities required by this contract are that the Depository shall credit the account(s) of the ISD with the full amount of all State of Texas Warrants presented to the Depository for the account of the ISD no later than the banking day next following the day of the Depository's receipt of such Warrants and for funds transferred electronically the ISD shall receive credit on the effective settlement date, that the Depository shall faithfully perform all duties and obligations devolving upon the Depository by law and this contract, pay upon presentation all checks or drafts drawn on order of the Board of Trustees of the ISD in accordance with its orders duly entered according to the laws of Texas, pay upon demand any demand deposit of the ISD in the Depository , pay any time deposit or certificate of deposit of the ISD in the Depository upon maturity or after the period of notice required, and faithfully keep, account for as required by law, and faithfully pay over, at maturity or on demand as the ISD may elect, to any successor depository all balances of funds of the ISD then on deposit with the Depository;

(4) the pledge of approved securities required by this contract shall be a continuing pledge, ceasing only upon the later of the termination of this contract or the fulfillment by the Depository of all of its duties and obligations arising out of this contract, and a continuing security interest in favor of the ISD shall attach immediately upon any such pledge to all proceeds of sale and to all substitutions, replacements, and exchanges of such securities, and in no event shall such continuing security interest be voided by any act of the Depository; but not withstanding the foregoing the Depository shall have right, with the consent of the ISD, to purchase and sell, and substitute or replace, any and all of the approved securities pledged pursuant to this contract with other approved securities, provided that all of the other conditions of this contract are adhered to by the Depository, and such pledge shall be in addition to all other remedies available in law to the ISD;

[~~(5) this contract shall become binding upon the ISD and the Depository only upon acceptance by the Texas Education Agency of this contract and the bid attached hereto;~~]

(5) [~~(6)~~] the Depository shall immediately furnish or cause to be furnished to the ISD original and valid safekeeping or trust receipts issued by the custodian holding the approved securities pledged pursuant to this contract, marked by the custodian on their face to show the pledge and market value as required above, and Depository shall upon request of ISD provide description of securities being pledged and evidence that securities are legally acceptable in accordance with (1) above; [~~, and the ISD shall promptly furnish all executed copies of this contract, photocopies of all such receipts, and photocopies of new receipts for substitutions and additions and written notice of deletions, when made, to the Texas Education Agency, School Financial Audits Division, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701, for acceptance by the Texas Education Agency;~~]

(6) the records of the Depository and/or the custodian of the securities pledged by the Depository may be subject to audit at any time, in accordance with Gov. Code 2257.061, Audits and Examinations by the Texas Education Agency, School Financial Audits Division, William B. Travis Building, 1701 N. Congress, Austin, Texas 78701;

[~~(7) venue for any litigation arising from a contractual dispute between a Depository and the ISD shall be in the county in which the ISD has its central office, provided that this venue designation shall not be deemed a waiver of any immunity which either party hereto may be entitled to claim; and~~]

(7) [~~(8)~~] upon any closing or failure of Depository, or any event deemed by a state or federal regulatory agency to constitute a closing or failure of Depository, title to all securities pledged pursuant to this depository contract shall be deemed to be vested in, and to be held by the ISD; and the ISD is hereby empowered to take immediate possession of and to sell any and all such pledged securities, whether in safekeeping at another bank or in possession of the ISD or the Depository, and the ISD is specifically so empowered by execution of this contract; and [~~. The collateral pledge agreement shall be:~~

~~1. In writing.~~
~~2. Executed by the Depository contemporaneously with the acquisition of the asset.~~
~~3. Approved by the Depository's Board of Directors or Loan Committee which approval shall be reflected in the Board's or Committee's minutes; and~~
~~4. Maintained continuously from the date of its execution as an official record of the Depository.~~]

(8) the collateral pledge agreement shall conform to the United States Code Annotated (USCA), Title 12, §1823(e), so to defeat the claim of the Federal Deposit Insurance Corporation, its successor, or any other receiver to the securities, and be:

1. In writing.

2. Executed by the Depository contemporaneously with the acquisition of the asset.
3. Approved by the Depository's Board of Directors or Loan Committee which approval shall be reflected in the Board's or Committee's minutes; and
4. Maintained continuously from the date of its execution as an official record of the Depository.

Copies of the Depository's Board of Directors or Loan Committee minutes shall be furnished to the ISD.

C. If the Depository elects to give both a corporate surety bond and to pledge approved securities, such corporate surety bond and pledged approved securities shall be in an aggregate amount which, together with applicable Federal Deposit Insurance Corporation insurance, shall adequately protect the total amount of ISD funds on deposit with Depository from day to day. The provisions of A, above, permitting the amount of the corporate surety bond to rise or fall from day to day, and all of the provisions of B, above, relating to the amount and conditions of pledge of approved securities, including but not limited to substitution and conditions of pledge, shall apply to the election permitted by this paragraph C.

D. the ISD shall be allowed by the Depository to purchase time deposits which mature after the ending date of the depository contract; however, the Depository may apply new interest rates to the time deposits after the ending date of this contract. The ISD shall be entitled to withdraw these time deposits without penalty at the expiration of the depository contract, but in that event, the Depository shall only be obligated to pay interest rates comparable to rates offered in the contract for the term the time deposits were actually held; provided, however, that the Depository may impose an early withdrawal penalty on a time deposit withdrawn within 6 days of creation of the deposit, to the extent required to comply with federal regulations defining time deposits.

E. The ISD and the Depository may agree to extend this contract for one additional two-year term in accodance with Section 45.205 of the Education Code. An extension under this subsection is not subject to the requirements of Section 45.206 of the Education Code.

F. Section 45.205 of the Education Code requires that this contract and any extension of this contract coincide with the ISD's fiscal year. In the event the ISD changes fiscal year in accordance with Section 44.0011 of the Education Code, the term of the contract may be shortened or extended no more than one year by agreement of the parties to coincide with the end of the new fiscal year, provided that this contract is to remain in effect until its successor is selected and has qualified. If the parties cannot agree, the ISD may at its option change the term of this contract to coincide with the end of a new fiscal year closest to its original expiration date.

G. This contract and/or an additional two-year extension of this contract and the bid attached hereto shall become binding upon the ISD and the Depository only upon acceptance by the Texas Education Agency.

H. Venue for any litigation arising from a contractual dispute between a Depository and the ISD shall be in the county in which the ISD has its central office, provided that this venue designation shall not be deemed a waiver of any immunity which either party hereto may be entitled to claim.

ARTICLE IV. On the execution date of this Depository Contract the depository bank agrees to cover by corporate surety bond and/or pledge of approved securities an amount that is equal to funds anticipated to be on deposit from day to day which is estimated not to exceed _____Dollars($_____), and warrants that the initial total corporate surety bond and securities in safekeeping and trust for the protection of the funds (including FDIC coverage) of the ISD in the hands of the Depository is as follows:

Corporate Surety Bond	$	_____	
Market Value of Securities Pledged	$	_____	
FDIC Insurance (Regular/Demand)	$	_____	(Maximum $100,000)
FDIC Insurance (Int. & Sinking)	$	_____	(Maximum $100,000)
FDIC Insurance (Time & Savings)	$	_____	(Maximum $100,000)
Total Initial Secured Amount	$	_____	

ARTICLE V. Subsequent to the execution date of this contract should the amount of deposit exceed that which is initially covered by corporate surety bond, pledged approved securities, and FDIC insurance, said amount will be increased, and photocopies of the safekeeping receipts of the additional securities and/or increased corporate surety bond will be provided in accordance with the Code and Texas Education Agency rules.

ARTICLE VI. This contract is executed by the ISD and the Depository in three copies, all of which shall be deemed originals.

TO BE COMPLETED BY ISD
AND VERIFIED BY BANK
(For all funds received from the Texas Education Agency)

				-					-	

Transit Routing Number
(Must be 9 digits)

Type of Account:
(Check One)

_____ Checking (22)

_____ Savings (32)

_____
Account Number
(Up to 13 digits)

AGREED AND ACCEPTED on behalf of ISD this the _____day of _____, _____

_____
Signature of President of School Board

_____
Signature of Secretary of School Board

A T T E S T:

AGREED AND ACCEPTED on behalf of Depository this the _____day of _____, _____

_____
Typed Name of Depository

_____
Signature of Authorized Officer

_____
Title of Authorized Officer

Acknowledgment

STATE OF TEXAS)

COUNTY OF _____)

Before me, the undersigned authority in and for said county and state, on this day personally appeared _____ known to me to be the person whose name is
Bank Officer
subscribed to the foregoing instrument on behalf of the Depository named therein, and known to me to be an officer authorized to execute the foregoing instrument on behalf of said depository, and acknowledged to me that (s)he executed the same as the act and deed of said Depository, for the purpose therein expressed and in the capacity therein stated.

Given under my hand and seal of office this the _____ day of _____, _____.

_____
Signature of Notary

Notary Public in and for _____

(SEAL)

County, Texas

My Commission Expires _____

ACCEPTED AND FILED AT TEXAS EDUCATION AGENCY, AUSTIN, TEXAS
_____, _____ _____The School Financial Audits Division
Date *Signature*

Figure: 25 TAC §297.8(b)(4)

TABLE I. Common Indoor Air Conditions/Contaminants in Government Buildings

Condition Or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Temperature	Weather, occupants, equipment, and HVAC systems.	Normally a comfort and productivity issue; high temperature may cause heat stress.	70 to 76 degrees Fahrenheit(°F). Control within range of ± 2 degrees Fahrenheit (°F)for a given day.	Comfort related to temperature, RH, air velocity, and occupant preferences, activity and attire.
Relative Humidity (RH)	Moisture produced from weather, occupants, and other water sources.	Normally a comfort and productivity issue; high RH may cause "sticky feeling", and moisture damage to building contents; low RH may cause dry/itchy eyes, mucous membranes and skin.	30-60 % 30-50 % preferred for better mold prevention. For low RH regions: <30% acceptable if no occupant discomfort.	Comfort related to temperature, RH, air velocity, activity and attire. Below 50% prevents most mold growth.
Air Velocity	HVAC systems, individual and equipment fans, significant area pressure changes.	Being too hot or too cold within the recommended temperature and relative humidity ranges, dry eyes, sore throats and nasal irritation.	25 to 55 feet per min (fpm).	Comfort related to temperature, RH, air velocity, activity and attire.
Allergens (allergy is a hypersensitivity to a substance that does not normally cause a reaction)	Allergies may be caused by protein or an antigen. Animal dander, cockroach droppings, dust mite fecal matter, insects and insect parts, dust, latex.	Sneezing, runny or congested nose, coughing, wheezing, postnasal drip, sore throat, watering eyes, and itching eyes, nose and throat. Allergic shiners (dark circles under the eyes).	Allergens: Cat: 8 µg/g Dust Mite: 2 µg/g Cockroach: 5 µg/g	According to National Institute of Health as many as 50 million Americans are affected by allergic diseases.
Asbestos (fibrous material)	Building materials such as ceiling textures, wall compounds, resilient floor covering, pipe insulation.	Lung cancer, asbestosis, dyspnea, interstitial fibrosis, restricted pulmonary function and eye irritation.	0.01 fibers per cubic centimeter (f/cc)	Asbestos containing materials should not be used or installed in building.

Condition Or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Carbon Dioxide (CO_2) (Odorless gas)	Occupants' respiration; unvented or poorly vented indoor combustion sources; vehicle exhaust via traffic and parking garages; and outside air.	Indicator of amount of outside air in area. High levels may result in complaints of odors, "stuffy air", sleepiness, fatigue, and headaches.	700 ppm above outdoor level - should trigger concern over adequate fresh air.	Acceptable levels should prevent complaints of odors (body odors) and stuffy air.
Carbon Monoxide (CO) (Odorless gas)	Outside air, unvented or poorly vented indoor combustion sources, such as gas heaters and appliances; and vehicle exhaust in parking garages.	Headaches, dizziness, and nausea. At moderate concentrations, angina, impaired vision and reduced brain function. High levels can be fatal.	9 ppm for 8 hrs. 35 ppm for 1 hr.	If high levels of CO suspected, remove occupants. Blood analysis can verify exposure if done within an hour.
Environmental Tobacco Smoke	Tobacco combustion.	Group A carcinogen by EPA, respiratory effects, multiple effects on children.	No level is considered acceptable, particularly for children and non-smokers.	Surgeon General recommends smoking only be allowed inside buildings if smoking area has separate ventilation system.
Formaldehyde (HCHO) (pungent odor)	Pressed-wood products (e.g. furniture and furnishings), embalming fluid, textiles and foam insulation.	Irritant of eyes, and respiratory tract, sensitizer, and possible carcinogen.	0.04 ppm Odor Threshold: 0.05-1.0 ppm	Tobacco smoke and other combustion sources are secondary sources.
Fungi (mold, mildew, yeasts) (biological)	Outdoor air-not normally a major source in building with good air filtration systems. Wet/damp building materials and furnishings, particularly after 24 hours. Air handling systems. Poorly maintained indoor plants. Spoiling food.	Allergies (most common) - Sneezing, runny or congested nose, coughing, wheezing, and postnasal drip, sore throat, watering eyes, and itching eyes, nose and throat. Difficulty breathing. Nose, throat, skin and eye irritation, rashes, headaches, and less common symptoms (i.e., aches, fever, fatigue, and central nervous problems).	Visible mold on surfaces or mold odors is unacceptable. Dry or discard water-damaged materials within 24 hours. Maintain relative humidity <50% year round.	Rely on visual inspection, odors, history of moisture problems and occupant complaints and health symptoms. Remove mold growth and eliminate source of moisture.

Condition Or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Hydrogen Sulfide (H_2S) (rotten egg odor)	Sewer gas Dry drain traps or broken sewer lines.	Irritant to eyes and respiratory tract, headache, dizziness, and nausea.	0.07 ppm Odor 0.001 ppm	Water must be kept in p-traps of drains that are connected to sewer lines.
Lead (Pb) (dust or fumes containing lead)	Paint, dust, welding and soldering activities and outdoor air	Brain damage, particularly in children under 6 years old, weakness, and anemia.	0.0015 mg/m^3	Flaking lead-based paint a concern. Certain lead-based paint abatement activities are regulated.
Legionella (bacteria)	Natural and man-made stagnant water sources. Warm conditions and certain pH conditions will accelerate growth.	Legionnaires' disease: form of pneumonia. Mild cough and low fever to rapidly progressive pneumonia and coma. Early symptoms include malaise, muscle pain, and headache; later symptoms include high fever, dry cough and shortness of breath.	Prevent sources of stagnant water, particularly warm sources that rapidly produce bacteria; or if not preventable, periodically chemically or thermally disinfect.	For hot water sources: holding temperature: 140 °F; delivery temperature: 122 °F, or monthly thermally disinfect.
Mercury (Hg) (Silver-white, heavy liquid metal)	Thermometers, barometers, batteries, fluorescent light bulbs, blood pressure devices and electrical switches.	Irritation to eyes, skin, cough, chest pain, trouble breathing depending on exposure.	0.0002 mg/m^3	
Nitrogen Dioxide (NO_2) (acrid odor)	Leaking vented combustion appliances, unvented combustion appliances, outdoor air, diesel engines near loading docks. Welding, tobacco smoke.	Irritation to eyes, nose, throat. May induce cough. At higher concentrations depending on exposure time may result in chronic bronchitis, chest pain and pulmonary edema.	0.05 ppm	
Ozone (O_3) (pungent odor)	Electrostatic appliances, office machines, ozone generators, outdoor air.	Irritation to eyes and mucous membranes. Pulmonary edema and exposure times may lead to respiratory disease.	0.05 ppm	Can damage plants, some materials, particularly rubber-containing materials and certain plastics.

Condition Or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
Particulate Matter (dust) (non-toxic particles; toxic particles covered elsewhere)	Construction and renovation activities, movement of materials, paper dust from printers, dust-producing activities and outside.	Sneezing, coughing and itchy eyes. Some particles more hazardous than others, and can cause irritation to eyes and lungs. Respirable particles more of hazard concern.	PM_{10} - 150 $\mu g/m^3$ (24 Hour)* $PM_{2.5}$ - 65 $\mu g/m^3$ (24 Hour) and 15 $\mu g/m^3$ (Annual Mean)*	* See 40 CFR 50.7 for definitions and additional information.
Pesticides (includes insecticides, fungicides, rodenticides, termiticide, herbicides, and fumigants.	Direct indoor application of pesticides by occupant or commercial applicator. Outside, particularly near agriculture.	Irritation of eyes and mucous membranes, headache, dizziness, weakness, tingling sensation, nausea, blurred vision, vomiting, tremors, abdominal cramps, chest tightness, and liver damage. Some are possible carcinogen(s). Avoid skin contact with pesticides. Organochlorine and organophophorus pesticides are generally more toxic than other type pesticides.	2,4-D 0.01 mg/m^3 2,4,5-T 0.10 mg/m^3 DDT 0.001 mg/m^3 Chloropyrifos 0.002 mg/m^3 Aldrin 0.0025 mg/m^3 Benomyl 0.05 mg/m^3 Chlordane 0.005 mg/m^3 Chloropyrifos 0.002 mg/m^3 Dichlorvos 0.009 mg/m^3 Diazinon 0.001 mg/m^3 Dursban 0.002 mg/m^3 Heptachlor 0.0005 mg/m^3 Malathion 0.05 mg/m^3 Paraquat 0.001 mg/m^3 Parathion 0.0005 mg/m^3 Pyrethrum 0.05 mg/m^3 Roundup 0.05 mg/m^3 Sevin 0.050 mg/m^3 Warfarin 0.001 mg/m^3	Avoid use of chemical pesticide treatments if possible. Chlordane, heptachlor, aldrin, and diedrin should not be used. Chloropyrifos (Dursban) and Diazinon should not be used indoors. Recommend use of businesses that conform to 22 Texas Administrative Code, §595.14 Reduced Impact Pest Control Services.
Radon (Rn)	Soil, rocks, and water from	Radon and its decay products emit	4 picocuries per liter of	Buildings can

Condition Or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
(naturally occurring, odorless, radioactive gas)	the natural breakdown (radioactive decay) of uranium. Radon also breaks down into radioactive decay products.	ionizing radiation which if inhaled can damage the lung tissue and may cause lung cancer over time.	air (pCi/L)	inexpensively be tested for radon
Sulfur Dioxide (SO_2) (pungent odor)	Unvented space heaters (kerosene), other combustion sources, outdoor air.	Eye irritation, skin irritation, respiratory irritation	0.01 ppm	
Volatile Organic Compounds (VOCs) (many are odorless, some have odor) Volatile Organic Compounds - continued	New building materials and furnishings, consumer products, maintenance materials, outdoor air, cleaners, personal care products, tobacco smoke, paints, pesticides, solvents, combustion processes.	May cause variable responses such as irritation of eyes, nose and upper respiratory tract, headaches, lightheadedness, and nausea. A few VOCs have been directly linked to cancer in humans and others are suspected of causing cancer.	Acetone 26 ppm Alkanes C4-C16 (if not listed) 2.5 mg/m^3 Alkanes >C16 0.07 mg/m^3 Aromatic distillates, light 0.17 ppm Aromatic distillates, heavy 0.43 ppm Benzene 0.05 ppm 2-butoxyethanol 6 ppm decane 1.22 ppm Ethylbenzene 1.0 ppm* Gasoline (<0.9% benzene) 0.83 ppm n-hexane 0.6 ppm isobutane 3.4 ppm isopropyl alcohol 2.2 ppm Methylene chloride 0.6 ppm Naphtha, coal tar 0.62 ppm Naphthalene 0.002 ppm**	For total VOCs: 0.3-3 mg/m^3 - complaints possible; >3 mg/m^3 -complaints likely. Product emission rate should not result in an indoor concentration level greater than 0.5 mg/m3 of total VOCs. * level for 14 to 364 days exposure ** level for 365 days and longer exposure

Condition Or Contaminant	Major Sources	Comfort/Health Effects	MRL Guidelines [1]	Comments
			Styrene 0.06 ppm** Tetrachloroethylene 0.2 ppm 1,1,1-trichloroethane 1.4 ppm Trichloroethlyene 0.175 ppm Toluene 1 ppm Xylenes (o,m,p) 1 ppm	

(1) Concentration units: mg/m^3 = milligrams of contaminant per cubic meter of air
ppm = parts of contaminants per parts of air (on a volume per volume basis)
µg/g = micrograms of contaminant per gram of material

Figure: 40 TAC §745.37

Residential Child-Care Operations	Description	Type of Permit
(A) Foster Family Home (Independent)	An operation that provides care for six or fewer children up to the age of 18 years.	License
(B) Foster Group Home (Independent)	An operation that provides care for seven to 12 children up to the age of 18 years.	License
(C) Emergency Shelter	An operation that provides short-term care (less than 30 days), for 13 or more children up to the age of 18 years.	License
(D) Operation Providing Basic Child Care	An operation that provides care for 13 or more children up to the age of 18 years. The care does not include specialized care programs.	License
(E) Residential Treatment Center	An operation that provides care and treatment for 13 or more emotionally disturbed children up to the age of 18 years.	License
(F) Therapeutic Camp	An operation that provides a camping program for 13 or more children, ages seven up to the age of 18 years. It is designed to provide an experiential therapeutic environment for children who cannot function in their home school or community.	License
(G) Operation Serving Children With Mental Retardation	An operation that provides care for 13 or more children up to the age of 18 years. The children in care are significantly below average in general intellectual functioning and also have deficits in adaptive behavior.	License
(H) Halfway House	An operation that provides transitional living services for 13 to 24 children, ages 15 up to the age of 18 years. The purpose of this operation is to prepare older children for independent living.	License
(I) Child-Placing Agency (CPA)	A person, agency, or organization other than a parent who places or plans for the placement of a child in an adoptive home or other residential care setting.	License
(J) Maternity Home	An operation that provides care for four or more minor and/or adult women and her children during pregnancy and/or during the six-week postpartum period.	License

Figure: 40 TAC §745.129

Exempt Miscellaneous Programs	Criteria for Exemption
(1) Neighborhood Recreation Program	(A) The program provides activities designed for recreational purposes for children ages 5-13; (B) The services and activities are not structured to provide after-school child day care; (C) The program must comply with national standards for care that include, at a minimum, staffing ratios, staff training, and health and safety standards and mechanisms for assessing and enforcing the national standards; (D) The program does not collect compensation for its services; (E) Children participating in the activities are free to join or leave the program at will. If the program provides transportation from school, children may choose whether to use the transportation from school and when to leave the program and walk home without adult supervision; (F) The program must require all parents to sign a statement allowing their children to come and go at will from the program. (G) The program must tell each parent that Licensing does not regulate the operation; (H) The program must provide a process to receive and resolve parental complaints; and (I) The program must make arrangements with the Department of Public Safety for criminal background checks for all employees and volunteers who work with children.
(2) Caregiver Has Written Agreement with a Parent to Provide Residential Care	(A) A child may live with someone other than a relative if the non-relative caregiver does not care for more than one child or sibling group; (B) The caregiver had a prior relationship with the child(ren) or family of the child(ren); (C) The caregiver does not receive compensation or solicit donations for the care of the child or sibling group; and (D) The caregiver has a written agreement with the parent to care for the child or sibling.
(3) Emergency Shelter for Minor Mothers	(A) The emergency shelter is providing shelter to minor mothers; (B) The mothers are the sole support of their children; (C) The shelter provides care for the mother and her child(ren) only when there is an immediate danger to the physical health or safety of the mother or her child(ren); and (D) The shelter does not provide care for more than 15 days unless the parent of the minor mother consents, or the minor mother has qualified for Temporary Assistance for Needy Families and is on the waiting list for housing assistance.

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 Building and Procurement Commission

Notice of Contract Airline Fares Request for Proposal

The Texas Building and Procurement Commission (TBPC) announces Addendum #1 to Request for Proposal (RFP) for Contract Airline Fares (RFP #13-0702AF) to be provided to the State of Texas pursuant to the Texas Government Code, Section 2171.052. Any contract which results from this RFP shall be for the term of October 1, 2002, through August 31, 2003.

Inquiries:

Addendum #1 reflects needed revisions that were identified in written responses to inquiries received by July 19, 2002. A summary of the questions and clarification requests is also available.

Submission of Response to the RFP:

Responses to the RFP shall be submitted to and received by the TBPC Bid Tabulation on or before 3:00 p.m., Central Daylight Time, on August 13, 2002, and shall be delivered or sent to: The Texas Building and Procurement Commission, Attn: Bid Tabulation, RFP #13-0702AF, 1711 San Jacinto Blvd., Room 180, Austin, Texas 78701, or P.O. Box 13047, Austin, Texas 78711-3047.

Copies of RFP:

If you are interested in receiving a copy of the RFP and Addendum #1, contact Ms. Bonnie Barrington, at (512) 463-5773 to request a copy.

TRD-200204657
Juliet U. King
Legal Counsel
Texas Building and Procurement Commission
Filed: July 26, 2002

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of July 19, 2002, through July 25, 2002. The public comment period for these projects will close at 5:00 p.m. on August 30, 2002.

FEDERAL AGENCY ACTIONS:

Applicant: Eldridge Construction; Location: The project is located on the Sabine Pass Ship Channel at 5121 South First Avenue at Station 210+00 in Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Sabine Pass, Texas. Approximate UTM Coordinates: Zone 15; Easting: 415833; Northing: 3287603. Project Description: The applicant proposes to fill and excavate approximately 4.29 acres of jurisdictional wetlands. The fill will increase the land elevation 2 feet above the existing grade and will directly impact 3.53 acres of high marsh. The existing 35-foot-wide drainage canal will be excavated to 125 feet wide and -12 feet below mean low tide (MLT) for 370 feet upstream to accommodate drilling rigs . Each side of the canal will be bulkheaded, impacting fringe intertidal vegetation. The fringe wetland is approximately 0.01-acre on each side of the canal. Approximately 0.76-acre of high marsh and 0.30-acre of shallow water habitat/fringe marsh will be impacted due to the excavation of approximately 18,400 cubic yards of material from the canal. At the southwest end of the drainage canal, a 30-foot culvert bridge will be constructed to accommodate heavy equipment. The bridge will have three 60-inch culverts for tidal exchange. The bridge has been designed to meet city drainage requirements and to prevent salt-water intrusion into the fresh water marsh areas located upstream of the drainage canal. Before any excavation of the channel is conducted, the applicant will install the permanent bridge. To gain access to the site, a temporary bridge will be installed in the drainage canal at 1st Street prior to any excavation of the canal. In addition, the applicant proposes to reclaim 0.83-acre of open water/tidal marsh of the Sabine River in an effort to minimize dredging and fill placed in wetlands. The bulkhead

will extend 100 feet out from the northwest side and 200 feet out from the southeast side of the property. The bulkhead will be approximately 240 feet wide along the shoreline. The water depth at the bulkhead head is approximately -2 feet MLT. Approximately 2,000 cubic yards of material will be required for the backfill. The proposed bulkhead and backfill will impact intertidal wetlands along the shoreline.

The applicant will also conduct mechanical and hydrologic dredging of open water in the Sabine River. A 0.98-acre channel will be dredged from the outlet of the drainage canal to the channel. Additionally, a 0.62-acre area will be dredged in front of the proposed bulkhead. The projected depth of the dredging in open water will be -15 feet MLT. Approximately 19,500 cubic yards of material will be excavated. If the applicant chooses to use hydrologic dredging, a dredged material placement area will be constructed on the back half of the impacted property. An outfall pipe will have the return water deposited into the drainage canal along the backside of the property. To compensate for unavoidable impacts to 4.29-acre of high marsh and 0.15-acre of intertidal marsh, the applicant has developed a mitigation plan. For the intertidal marsh impacts, the applicant proposes to use the dredged material to create a 0.28-acre marsh along the northwest shoreline which is currently devoid of vegetation and is exhibiting erosion characteristics along the shoreline. The impacted vegetation will be removed and replanted in the mitigation area. Approximately 670 cubic yards of material will be required to bring the elevation up to the projected water depth of approximately -0.5-foot mean high tide (MHT). The applicant will use board mats to access the site. Monitoring requirements and survival criteria are included in the project plans. For the impacts to 4.29-acre of high marsh, the applicant proposes to purchase and enhance an 8.72-acre tract in Sabine Pass and preserve it in perpetuity. The site has existing levees used historically as a stock tank for baitfish. The proposed enhancements include removing the existing levees to adjacent contours. Additionally, the applicant would like to turn over the property to a non-profit organization for management. CCC Project No.: 02-0223-F1; Type of Application: U.S.A.C.E. permit application #22311 (Revised) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). NOTE: The CMP consistency review for this project may be conducted by the Texas Natural Resource Conservation Commission as part of its certification under §401 of the Clean Water Act.

Applicant: Houston Marine Services, Inc.; Location: The project site is located on the Houston Ship Channel, approximately 0.5-mile east of the north landing of the Lynchburg Ferry in Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled Highlands, Texas. Approximate UTM Coordinates: Zone 15; Easting: 300000; Northing: 3294500. Project Description: The applicant proposes an amendment to include the installation of 76 new barge-mooring buoys necessary for the on-going operations and upgrade of the applicant's existing barge facility. CCC Project No.: 02-0225-F1; Type of Application: U.S.A.C.E. permit application #19115(05) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on 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-200204964
Larry R. Soward
Chef Clerk, General Land Office
Coastal Coordination Council
Filed: July 31, 2002

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Comptroller of Public Accounts

Notice of Contract Award

The State Council on Competitive Government (Council) announces this notice of contract award in connection with the Request for Proposals for Automotive Part Warehousing Services to assist participating state agencies in obtaining automotive parts to maintain state vehicles (RFP #140b). The Council announces that a contract is awarded as follows:

The notice of issuance of this RFP #140b was published in the Electronic State Business Daily on May 16, 2002.

Impac Auto Parts, Inc., 24 New Mexico Road, Limestone, Maine 04750. The total contract amount is based on a discount from list price and is dependent on useage by participating state agencies.

The term of the contract is July 25, 2002 through August 31, 2005.

TRD-200204713
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: July 26, 2002

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Notice of Contract Award

The Texas Comptroller of Public Accounts (Comptroller) announces this notice of contract award in connection with the Request for Proposals for Collection Services to assist the Comptroller in the collection of delinquent state taxes (RFP #140e). The Comptroller announces that a contract is awarded as follows:

The notice of issuance of this RFP #140e was published in the *Texas Register* on May 17, 2002 in Volume 27, Page 4405 and also posted on the Texas Marketplace on May 17, 2002.

OSI Collection Services, Inc., 800 Wilcrest, Suite 300, Houston, Texas 77042. The total contract amount is based on a percentage of the amounts collected on delinquent tax accounts referred to the contractor.

The term of the contract is July 24, 2002 through August 31, 2004.

TRD-200204735
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: July 29, 2002

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Notice of Request for Proposals

Notice of Request for Proposals: Pursuant to Chapter 403, Sections 403.011, 403.105, 403.1041, and 403.1069; and Chapter 404, Subchapter G, Sections 404.103, 404.104, and 404.104(c); and Chapter 2254, Subchapter A, and Chapter 2256; and Chapter 791, Texas Government Code, the Comptroller of Public Accounts (Comptroller), on

behalf of the Texas Treasury Safekeeping Trust Company (Trust Company), announces issuance of its Request for Proposals (RFP #145b) from qualified, independent firms or individuals to provide professional certified accounting services to perform separate financial audits (Audits) of the Texas Local Government Investment Pool (TexPool) and the Texas Tobacco Settlement Permanent Trust (Trust) for the Trust Company. The selected contractor or contractors (Contractor) will provide the requested services to the Trust Company to complete one or both Audits. The Trust Company reserves the right to award one or more contracts under this RFP. If approved by the Trust Company, the Contractor will be expected to begin performance of the contract, if any, on or about September 10, 2002.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Room G-24, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, August 9, 2002, between 2:00 p.m. and 5:00 p.m. Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Texas Marketplace after Friday, August 9, 2002, 2:00 p.m. CZT. The new Texas Marketplace website address is http://esbd.tbpc.state.tx.us.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-Mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Friday, August 23, 2002. Prospective proposers are encouraged to fax Non-Mandatory Letters of Intent and Questions to (512) 475-0973 to ensure timely receipt. The Letter of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding section of the RFP and be signed by an official of that entity. On or before Friday, August 30, 2002, the Trust Company expects to post responses to questions as a revision to the Texas Marketplace notice of issuance of this RFP. Non-mandatory Letters of Intent and Questions received after the deadline will not be considered; respondents shall be solely responsible for ensuring timely receipt of all Letters of Intent and Questions.

Closing Date: Proposals must be delivered to the Office of Assistant General Counsel, Contracts, at the location specified above (ROOM G24) no later than 2:00 p.m. (CZT), on Friday, September 6, 2002. Proposals received in ROOM G24 after this time and date will not be considered; respondents shall be solely responsible for ensuring the timely receipt of their proposals in the Issuing Office, ROOM G-24.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Comptroller and Chief Executive Officer of the Trust Company will make the final decision on award(s). The Trust Company reserves the right to accept or reject any or all proposals submitted. The Trust Company is not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Trust Company shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - August 9, 2002, 2:00 p.m. CZT; Non-Mandatory Letters of Intent and Questions Due - August 23, 2002, 2:00 p.m. CZT; Official Responses to Questions posted - August 30, 2002; Proposals Due - September 6, 2002, 2:00 p.m. CZT; Contract Execution - September 10, 2002, or as soon thereafter as practical; Commencement of Work - September 10, 2002. Revisions to this schedule, if any, will be posted as revisions to the Texas Marketplace notice of issuance of this RFP.

TRD-200204882
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 31, 2002

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Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, and §403.011 and §403.020, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the issuance of a Request for Proposals (RFP #145a) from qualified, independent firms to provide pooled consulting services to Comptroller. The successful respondent(s) will assist Comptroller in conducting management and performance reviews of various functions of independent school districts throughout the state on an as-need, as-requested basis. Comptroller reserves the right, and anticipates that multiple qualified, independent consulting firms may be selected to participate in a pooled consulting contract as set forth in this RFP. The successful respondent(s) will be expected to begin performance of the contract or contracts, if any, upon assignment on or about September 30, 2002.

Contact: Parties interested in submitting a proposal should contact Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 East 17th Street, ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, to obtain a copy of the RFP. Comptroller will mail copies of the RFP only to those specifically requesting a copy. The RFP was made available for pick-up at the above-referenced address on Friday, August 9, 2002, between 2 p.m. and 5 p.m., Central Zone Time (CZT), and during normal business hours thereafter. Comptroller also made the complete RFP available electronically on the Texas Marketplace at: http://esbd.tbpc.state.tx.us after 2 p.m. (CZT) on Friday, August 9, 2002.

Mandatory Letters of Intent and Questions: All Mandatory Letters of Intent and questions regarding the RFP must be sent via facsimile to Mr. Harris at: (512) 475-0973, not later than 2:00 p.m. (CZT), on Wednesday, August 28, 2002. Official responses to questions received by the foregoing deadline will be posted electronically on the Texas Marketplace no later than August 30, 2002, or as soon thereafter as practical. Mandatory Letters of Intent received after the 2:00 p.m., August 28th deadline will not be considered. Respondents shall be solely responsible for confirming the timely receipt of Mandatory Letters of Intent to propose.

Closing Date: Proposals must be received in Assistant General Counsel's Office at the address specified above (ROOM G-24) no later than 2 p.m. (CZT), on Monday, September 9, 2002. Proposals received after this time and date will not be considered. Proposals will not be accepted from respondents that do not submit mandatory letters of intent by the August 28, 2002, deadline. Respondents shall be solely responsible for confirming the timely receipt of proposals.

Evaluation and Award Procedure: All proposals will be subject to evaluation by a committee based on the evaluation criteria and procedures set forth in the RFP. Comptroller will make the final decision regarding the award of a contract or contracts. Comptroller reserves the right to award one or more contracts under this RFP.

Comptroller reserves the right to accept or reject any or all proposals submitted. Comptroller is under no legal or other obligation to execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events is as follows:

Issuance of RFP--August 9, 2002, 2 p.m. CZT;

All Mandatory Letters of Intent and Questions Due--August 28, 2002, 2 p.m. CZT;

Official Responses to Questions Posted--August 30, 2002, or as soon thereafter as practical;

Proposals Due--September 9, 2002, 2 p.m. CZT;

Contract Execution--September 15, 2002, or as soon thereafter as practical;

Commencement of Project Activities--September 30, 2002.

TRD-200204962
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: July 31, 2002

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003, 303.005, and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 08/05/02 - 08/11/02 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 08/05/02 - 08/11/02 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by Sec. 303.005[3] for the period of 08/01/02 - 08/31/02 is 18% for Consumer/Agricultural/Commercial/credit thru $250,000.

The monthly ceiling as prescribed by Sec. 303.005 for the period of 08/01/02 - 08/31/02 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-200204773
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: July 30, 2002

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Interagency Council on Early Childhood Intervention

Request for Proposals

Notice of Invitation. The Interagency Council on Early Childhood Intervention (ECI) announces a Request for Proposal (RFP) for funding comprehensive early childhood intervention services in the following zip codes within Harris County for the period from November 1, 2002 through August 31, 2003: 77014, 77032, 77038, 77039, 77050, 77060, 77064, 77065, 77066, 77067, 77068, 77069, 77070, 77073, 77086, 77090, 77336, 77338, 77339, 77345, 77346, 77357, 77365, 77373, 77375, 77379, 77388, 77389, 77396, 77429, 77447, and the portion of 77088 in Klein Independent School District. The scope of work includes a comprehensive array of services to children with developmental delays and their families. All applicants must comply with all program requirements under V.T.C.A., Human Resources Code, Chapter 73 and 25 Texas Administrative Code, Chapter 621.

Contact Person. The RFP is available to all interested parties upon written request to Roland Greer, Interagency Council on Early Childhood Intervention, 4900 North Lamar Blvd., Austin, TX 78751-2399. A copy may also be obtained by calling (512) 424-6824 or by visiting the ECI administrative office at the address listed in this notice. Questions should be directed to Roland Greer at (512) 424-6825.

Closing Date. All proposals to be considered for funding must be received in the ECI administrative office by 5:00 p.m. on September 20, 2002. ECI reserves the right to reject all proposals if necessary.

Selection Criteria. Proposals will be evaluated based on the following "Best Value" criteria: past performance, quality of services, cost, ability to maximize local and federal income, ability to comply with state and federal program requirements, ability to deliver required services, and service area configuration. Review teams will make recommendations to the ECI Board for approval or denial of proposals received.

TRD-200204862
Mary Elder
Executive Director
Interagency Council on Early Childhood Intervention
Filed: July 31, 2002

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Texas Education Agency

Request for Comments on the Consolidated State Application

The Texas Education Agency (TEA) is requesting comments from interested members of the public on the Consolidated State Application submitted by the TEA under the Elementary and Secondary Education Act of 1965 (ESEA), as reauthorized by the No Child Left Behind Act of 2001, Public Law 107-110, Section 9302. This application has been approved by the United States Department of Education (USDE). The TEA may make adjustments to the application as a result of public comment.

In January 2002, the ESEA was reauthorized as the No Child Left Behind Act of 2001. The Consolidated State Application is the process used by Texas to apply for federal funding to the USDE. The application was developed through a statewide, coordinated effort and included the following federal education programs: Title I, Part A-- Improving Basic Programs Operated by Local Educational Agencies; Title I, Part B, Subpart 3--Even Start; Title I, Part C--Education of Migratory Children; Title I, Part D--Prevention and Intervention Programs for Children and Youth who are Neglected, Delinquent, or At-Risk; Title I, Part F--Comprehensive School Reform; Title II, Part A-- Teacher and Principal Training and Recruiting; Title II, Part D--Technology; Title III, Part A--English Language Acquisition, Language Enhancement, and Academic Achievement; Title IV, Part A, Subpart 1--Safe and Drug-Free Schools and Communities; Title IV, Part A, Subpart 2--Community Service Grants; Title IV, Part B--21st Century Community Learning Centers; Title V, Part A--Innovative Programs; Title VI, Part A, Section 6111--State Assessment Formula Grants; and Title VI, Part B, Subpart 2--Rural and Low-Income Schools.

Interested members of the public may review the content of the Consolidated State Application on the TEA website at http://www.tea.state.tx.us/nclb. Comments on the state application may be submitted in writing to: Vivian Smyrl, Texas Education Agency, Department of State and Federal Student Initiatives,

1701 North Congress Avenue, Austin, TX 78701 or by e-mail to nclb@tea.state.tx.us. Comments on the application will be accepted through Friday, August 30, 2002.

For clarifying information, please contact Vivian Smyrl, Texas Education Agency, Department of State and Federal Student Initiatives, 1701 North Congress Avenue, Austin, TX 78701, (512) 463-4090.

TRD-200204858
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: July 31, 2002

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General Land Office

Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Natural Resources Code, notice is hereby given that David Dewhurst, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Pyle and Associates, Inc., conducted on June 27, 2000, locating the following shoreline boundary:

The line of Mean High Water adjacent to Bayside City Park for a portion of the Copano Bay shoreline at the City Park in Bayside, Refugio County, Texas. This survey is filed as Article 33.136, Sketch # 1, Refugio County.

For a copy of this survey or more information on this matter, contact Ben Thomson, Director of Survey Division, Texas General Land Office at 512/463-5212.

TRD-200204698
Larry Soward
Chief Clerk
General Land Office
Filed: July 26, 2002

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Notice of Approval of Coastal Boundary Survey

Pursuant to §33.136 of the Natural Resources Code, notice is hereby given that David Dewhurst, Commissioner of the General Land Office, approved a coastal boundary survey, submitted by Shiner Moseley and Associates, Inc., conducted in April 2002, locating the following shoreline boundary:

The line of Mean High Water adjacent to Big Reef, Boddecker Channel, and Apffel Park for a portion of the Gulf of Mexico and Galveston Entrance Channel shoreline on the eastern end of Galveston Island, Galveston County, Texas. This survey is filed as Article 33.136, Sketch #12, Galveston County.

For a copy of this survey or more information on this matter, contact Ben Thomson, Director of Survey Division, Texas General Land Office at 512/463-5212.

TRD-200204712
Larry Soward
Chief Clerk
General Land Office
Filed: July 26, 2002

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Notice of Intent to Issue General Concurrence and Request for Public Comment

The Texas Coastal Coordination Council (Council) will consider the issuance of General Concurrence #5 at its meeting on September 5, 2002. The purpose of General Concurrence #5 is to assist the Federal Emergency Management Agency (FEMA) by expediting the Texas Coastal Management Program (CMP) consistency review of certain FEMA-funded activities and to identify those activities affecting certain coastal natural resource areas (CNRAs) where a full consistency determination will be required. General Concurrence #5 is designed to minimize the number of consistency reviews that must be performed for activities that are minor in scope and that do not have significant adverse effects on CNRAs within the Texas CMP boundary. General Concurrence #5 should shorten the time needed to comply with the Texas CMP for FEMA-funded projects and allow FEMA to more readily provide assistance following a federally declared coastal disaster.

FEMA and the Department of Emergency Management of the Texas Department of Public Safety implement Individual and Public 'grants' under FEMA's Individual and Public Assistance programs, under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 - 5206) and its implementing regulations contained in Title 44 CFR Part 206, regarding assistance for the repair or replacement of damaged facilities and structures. General Concurrence #5 is intended to incorporate FEMA's existing process for providing assistance for projects in major disaster areas.

The Council is authorized to issue General Concurrence #5 under 31 Texas Administrative Code (TAC) §506.28 and §506.35 and 15 Code of Federal Regulations (CFR) §930.53(b).

The proposed General Concurrence #5, as well as information concerning the Council and its duties, may be found on the Texas General Land Office website at http://www.glo.state.tx.us/coastal/ccc.html. To receive a copy of the proposed General Concurrence #5, please send a written request to Melinda Tracy, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas, 78711-2873, melinda.tracy@glo.state.tx.us, facsimile (512) 463-6311.

The Council solicits public comment regarding proposed General Concurrence #5. Comments may be submitted to Melinda Tracy, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas, 78711-2873, melinda.tracy@glo.state.tx.us, facsimile (512) 463-6311. In order to be considered, comments must be received by 5:00 p.m. on August 26, 2002.

TRD-200204965
Larry Soward
Chief Clerk
General Land Office
Filed: July 31, 2002

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Texas Department of Health

Amendment to the Notice of Request for Proposals for School Worksite Wellness Program to Promote Physical Activity and 5 A Day

The Texas Department of Health (department) published a Notice of Request for Proposals (RFP) for the School Worksite Wellness Program to Promote Physical Activity and 5 A Day in the July 26, 2002, issue of the *Texas Register* (27 TexReg 6740). This amendment is to reflect that the RFP was released July 26, 2002, rather than August 26, 2002, as previously published in the July 26, 2002, issue of the *Texas Register* (TRD-200204396).

Other pertinent information reflected in the original notice publication may be referenced as follows:

INTRODUCTION

The Texas Department of Health, Public Health Nutrition Division, invites proposals to develop and begin implementation of a comprehensive worksite wellness plan that addresses policy and environmental change strategies that promote physical activity and nutrition; i.e., 5 A Day.

ELIGIBLE APPLICANTS

Eligible applicants are nonprofit public and private individual schools. Awards will be limited to a maximum of two schools per school district.

AVAILABILITY OF FUNDS

Approximately $40,000 is available to fund an estimated 16 schools. Each award will not exceed $2,500. Applications in excess of $2,500 will be rejected as non-responsive. Awards will be based on the merits of the proposal and the availability of funds. The funding term is October 1, 2002 - September 30, 2003.

TO OBTAIN RFP

For more information or to receive a copy of the Request for Proposals (RFP), contact Claire Heiser, Bureau of Nutrition Services, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, telephone (512) 458-7111, extension 2298, or E-mail claire.heiser@tdh.state.tx.us. The submission deadline for the RFP is no later than 5:00 p.m., Central Daylight Saving Time, September 18, 2002.

TRD-200204963
Susan Steeg
General Counsel
Texas Department of Health
Filed: July 31, 2002

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Notice of Agreed Order with Gilbert Texas Construction, L.P.

On July 24, 2002, the director of the Bureau of Radiation Control (bureau), Texas Department of Health, approved the settlement agreement between the bureau and Gilbert Texas Construction, L.P. (licensee-L04569) of Fort Worth. A total administrative penalty in the amount of $6,000 was assessed the licensee for violations of 25 Texas Administrative Code, Chapter 289.

A copy of all relevant material is available for public inspection Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays). Contact Chrissie Toungate, Custodian of Records, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, by calling (512) 834-6688, or by visiting the Exchange Building, 8407 Wall Street, Austin, Texas.

TRD-200204851
Susan Steeg
General Counsel
Texas Department of Health
Filed: July 31, 2002

♦ ♦ ♦

Notice of Extension on the Submission Deadline for Request for Proposals for the Emergency Medical Services Regional Emergency Medical Dispatch Resource Center Pilot Project

The Texas Department of Health (department) published a Notice of Request for Proposals (RFP) Emergency Medical Services Regional Emergency Medical Dispatch Resource Center Pilot Project in the July 12, 2002, issue of the *Texas Register* (27 TexReg 6435).

The deadline for submitting the application, required forms, and copies has been extended from midnight, August 2, 2002, to midnight, August 30, 2002. Only those applications and copies that are received or postmarked on or before August 30, 2002, will be reviewed, regardless of the circumstances. Applications should be submitted to Kathy Perkins, Bureau Chief, Bureau of Emergency Management, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756. If delivered by hand, the proposal must be taken to the Exchange Building, Bureau of Emergency Management, 8407 Wall Street, Suite N402, Austin, Texas, no later than 5:00 p.m., Central Daylight Saving Time, on August 30, 2002.

The other pertinent information as outlined in the initial publication of the Notice of Request for Proposals under TRD-200204168 may be referenced as follows:

PURPOSE: The Emergency Medical Services (EMS) Regional Emergency Medical Dispatch (EMD) Resource Center Pilot Project was established for the purpose of delivering emergency medical pre-arrival instruction service for callers in underserved rural areas of Texas, where the local Public Safety Answering Points (PSAP) are unable to provide such service, by contracting with an existing emergency medical service-dispatching center to provide such instruction service. This program is administered by the Bureau of Emergency Management of the Texas Department of Health (department). The program provides reimbursement for approved cost incurred for a specific project completed during a specified contract period, October 1, 2002 through June 30, 2003.

DESCRIPTION: The department is seeking proposals for an existing emergency medical service-dispatching center to provide pre-arrival medical instruction service to emergency callers in outlying rural areas in which the local PSAP is unable to provide such service.

ELIGIBLE APPLICANTS: Proposals will be accepted from qualified agencies, organizations, corporations, municipal and other political subdivisions which are currently involved in the provision of emergency pre-arrival medical instruction in accordance with 25 Texas Administrative Code, §157.49 and which has the capacity and capability to deliver such service to an additional 20 callers per day. Entities must be operating in accordance with nationally recognized EMD standards and in good standing with no past or pending administrative actions by the department or any other regulatory agency.

Failure to comply with these requirements of the contract constitutes grounds for revocation of any award as part of the EMS Regional EMD Resource Center Pilot Project.

EVALUATION AND SELECTION: Proposals will be reviewed and evaluated based on information provided by the applicant. Eligibility criteria includes: an evaluation of all information in the application; consideration of the applicant's experience in emergency medical dispatching; the applicant's numerical application score; and references.

Proposals will be reviewed to ensure all budget items requested are applicable and appropriate and that implementation of the proposed project is possible. The commissioner of health or the commissioner's appointed agent will give final approval of the entity chosen.

CONTACT: Information concerning the Request for Proposals (RFP) may be obtained from Kathy Perkins, Bureau Chief, Bureau of Emergency Management, Texas Department of Health, 1100 West 49th Street, Austin, Texas, 78756, telephone (512) 834-6700, fax (512) 834-6736, or email (Kathy.Perkins@tdh.state.tx.us).

TRD-200204716

Susan Steeg
General Counsel
Texas Department of Health
Filed: July 29, 2002

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Texas Health and Human Services Commission

Notice of Public Hearing

The Texas Health and Human Services Commission (HHSC) and the Texas Department of Human Services (DHS) will conduct a joint public hearing on August 15, 2002, to receive public comment on proposed payment rates. Payment rates are being proposed for the Residential Care program to adjust the bed hold payment amount to reflect changes in SSI payments. Also, additional payment rate levels are being proposed for Attendant Compensation Rate Enhancement Levels 16-20 for the Primary Home Care/Family Care, Day Activity and Health Services, Community Based Alternatives, Community Living Assistance and Support Services, Deaf-Blind with Multiple Disabilities, Residential Care, and Community Based Alternatives Assisted Living/Residential Care programs. These programs are operated by DHS. These payment rates are proposed to be effective September 1, 2002. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.105(g) and 40 TAC §20.105(g), which require public hearings on proposed payment rates. The public hearing will be held on August 15, 2002, at 9:30 a.m. in the HHSC Public Hearing Room, in the Riata Building III, 12555 Riata Vista Circle, Austin, Texas 78727-6404. Written comments regarding payment rates may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Tony Arreola, HHSC Rate Analysis, MC Y-995, 1100 West 49th Street, Austin, Texas 78756-3101. Express mail can be sent, or written comments can be hand delivered, to Mr. Arreola, HHSC Rate Analysis, MC Y- 995, Riata Building III, 12555 Riata Vista Circle, Austin, Texas, 78727-6404. Alternatively, written comments may be sent via facsimile to Mr. Arreola at (512) 685-3104. Interested parties may request to have mailed to them or may pick up a briefing package concerning the proposed payment rates by contacting Mr. Arreola.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Mr. Arreola, by August 13, 2002, so that appropriate arrangements can be made.

TRD-200204663
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: July 26, 2002

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Public Notice Statement

The Texas Health and Human Services Commission is publishing public notice regarding the Department's intent to submit TN# 02-07, Amendment #626, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. Amendment #626 implements the addition of two new provider types, Registered Nurse First Assistant and Licensed Surgical Assistant, to be reimbursed under the Texas Medical Assistance Program.

The proposed amendment is to be effective January 1, 2003, and is expected to increase the amount of FMP to the state. The proposed amendment will result in an increase to federal expenditures of $1,047,172 for state fiscal year 2004 and $1,076,845 increase for state fiscal year 2005.

Copies of the proposed reimbursement methodology may be obtained from Gregory Brennan, Texas Health and Human Services Commission, MC Y-975, 1100 West 49th Street, Austin, Texas 78756, (512) 338-6422.

The draft revision is available for public review at local offices of the Texas Department of Human Services. For further information, contact Gregory Brennan at (512) 338-6422.

TRD-200204850
Marina S. Henderson
Executive Deputy Commissioner
Health and Human Services Commission
Filed: July 31, 2002

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Texas Department of Housing and Community Affairs

Multifamily Housing Revenue Bonds (Mark IV Apartments) Series 2002

NOTICE OF PUBLIC HEARING

TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS MULTIFAMILY HOUSING REVENUE BONDS (MARK IV APARTMENTS) SERIES 2002

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at Summerglen Branch Public Library, located at 4205 Basswood Boulevard, Fort Worth, Texas 76137 at 6:00 p.m. on August 29, 2002 with respect to an issue of tax-exempt multifamily residential rental project revenue bonds in the aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Ironwood Ranch Townhome Limited Partnership, a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing and equipping a multifamily housing project (the "Project") described as follows: 280-unit multifamily residential rental development to be constructed on approximately 26.812 acres of land located on the south side of the 2900 block of Western Center Boulevard in Fort Worth, Tarrant County, Texas 76137. The project will be initially owned and operated by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or requests for additional information may be directed to Robert Onion at the Texas Department of Housing and Community Affairs, 507 Sabine, Austin, Texas 78701; (512) 475-3872 and/or ronion@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Robert Onion in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Robert Onion prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200204960

Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: July 31, 2002

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Notice of Public Hearing

RESIDENTIAL MORTGAGE REVENUE AND REFUNDING BONDS

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Department") at 507 Sabine Street, Room 436, Austin, Texas, at 12:00 noon on September 10, 2002, with respect to an issue of tax-exempt residential mortgage revenue bonds (the "Bonds") to be issued in an aggregate face amount of not more than $135,000,000.

A portion of the proceeds of the Bonds will be used directly to make single family residential mortgage loans. A portion of the proceeds of the Bonds will be used to refund all or a portion of the Department's outstanding Single Family Mortgage Revenue Refunding Tax-Exempt Commercial Paper Notes, Series A (AMT), thereby making funds available to make additional single family residential mortgage loans. All of such single family residential mortgage loans will be made to eligible very low, low and moderate income first-time home buyers for the purchase of homes located within the State of Texas, and are expected to be in an aggregate estimated amount of $135,000,000.

For purposes of the Department's mortgage loan finance programs, eligible borrowers generally will include individuals and families whose family income does not exceed, (i) for families of three or more persons, 115% (140% in certain targeted areas) of the area median income, and (ii) for individuals and families of two persons, 100% (120% in certain targeted areas) of the area median income. The Department anticipates setting aside approximately 30% of the funds made available for borrowers of very low income (60% of area median income) for approximately one year. In addition, substantially all of the borrowers under the programs will be required to be persons who have not owned a principal residence during the preceding three years. Further, residences financed with loans under the programs will be subject to certain other limitations, including limits on the purchase prices of the residences being acquired. All the limitations described in this paragraph are subject to revision and adjustment from time to time by the Department pursuant to applicable federal law and Department policy.

All interested parties are invited to attend such public hearing to express their views with respect to the Department's mortgage loan finance program and the issuance of the Bonds. Questions or requests for additional information may be directed to Matt Pogor at the Texas Department of Housing and Community Affairs, 507 Sabine Street, 8th Floor, Austin, Texas 78701; (512) 475-3987.

Persons who intend to appear at the hearing and express their views are invited to contact Matt Pogor in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Matt Pogor prior to the date scheduled for the hearing.

TDHCA WEBSITE: www.tdhca.state.tx.us/hf.htm

Individuals who require auxiliary aids for the hearing 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 hearing so that appropriate arrangements can be made.

This notice is published and the above-described hearing is to be held in satisfaction of the requirements of State law and Section 147(f) of the Internal Revenue Code of 1986, as amended, regarding the public approval prerequisite to the exclusion from gross income for federal income tax purposes of interest on the Bonds.

TRD-200204908
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: July 31, 2002

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Texas Department of Insurance

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by GuideOne Elite Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting various flex percentages (-30% to +69%) by coverage and territory for all classes. The overall rate change is +15.0%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by August 26, 2002.

TRD-200204853
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 31, 2002

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by GuideOne Lloyds Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages for all territories and classes by coverage: +86 for Bodily Injury, +20% for Property Damage, +31% for Personal Injury Protection and Medical, +5% for UM/UIM BIPD, +187 for Comprehensive, +61% for Collision and +30% for All Other, Towing & Labor, and Rental Reimbursement. The overall rate change is +17.5%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by August 26, 2002.

TRD-200204854

Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 31, 2002

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by GuideOne Mutual Insurance Company proposing to use rates for private passenger automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting flex percentages for all territories and classes by coverage: +86 for Bodily Injury, +20% for Property Damage, +31% for Personal Injury Protection and Medical, +5% for UM/UIM BIPD, +187 for Comprehensive, +61% for Collision and +30% for Towing & Labor, Rental Reimbursement, All Other (D&D) and Sound. The overall rate change is +17.4%.

Copies of the filing may be obtained by contacting Judy Deaver, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 322-3478.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by August 26, 2002.

TRD-200204855
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 31, 2002

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Notice of Application by a Small Employer Carrier to be a Risk-Assuming Carrier

Notice is given to the public of the application of the listed small employer carrier to be a risk-assuming carrier under Texas Insurance Code Article 26.52. A small employer carrier is defined by Chapter 26 of the Texas Insurance Code as a health insurance carrier that offers, delivers or issues for delivery, or renews small employer health benefit plans subject to the chapter. A risk-assuming carrier is defined by Chapter 26 of the Texas Insurance Code as a small employer carrier that elects not to participate in the Texas Health Reinsurance System. The following small employer carrier has applied to be a risk-assuming carrier:

Scott & White Group Hospital Service Corporation.

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal & Compliance Division - Jimmy G. Atkins, 333 Guadalupe, Hobby Tower 1, 9th Floor, Austin, Texas.

If you wish to comment on the application to be a risk-assuming carrier, you must submit your written comments within 60 days after publication of this notice in the Texas Register to Lynda H. Nesenholtz, Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-91204. An additional copy of the comments must be submitted to Mike Boerner, Managing Actuary, Actuarial Division of the Financial Program, Mail Code 302-3A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application, if the Commissioner is satisfied that all requirements of law have been met, the Commissioner or his designee may take action to approve the application to be a risk-assuming carrier.

TRD-200204571
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 25, 2002

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2528 at 9:30 a.m., September 17, 2002 in Room 100 of the William B. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas 78701. The hearing is concerning 28 TAC §§28 TAC §§34.801, 34.804, 34.806 - 34.808, 34.813 - 34.815, 34.817 34.818, 34.820, 34.828, 34.830, and 34.832, storage and sale of fireworks and license fees.

The proposed amended sections and the statutory authority for the proposed amended sections were published in the May 17, 2002, issue of the *Texas Register* (27 TexReg 4311).

TRD-200204770
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 29, 2002

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2527, on August 21, 2002, at 9:30 a.m. in Room 102 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, to consider eight reappointments and one new appointment to the Building Code Advisory Committee on Specifications and Maintenance (Committee).

The Commissioner is considering the reappointment of Ron Rohrbacher of League City, Texas, Jeffery Koellman of Corpus Christi, Texas, and Chester Sherman of Beaumont, Texas as building industry members; Robert Huxel with Farmers Insurance Group and Lisa Sturgeon with Allstate Insurance Company as insurance industry members; and Dr. Joseph Minor of Rockport, Texas, Robert Thorn of Port Isabel, Texas and John De La Cruz of Port Lavaca, Texas as public members.

The Commissioner is further considering the appointment of Ron Lawson of Safeco Insurance Company as an insurance industry representative who is a member of the TWIA Board of Directors to the Committee.

The Committee members will serve a three year term beginning on September 1, 2002 and expiring on September 1, 2005.

Article 21.49 §6C of the Insurance Code provides for the appointment of an advisory committee to advise and make recommendations to the Commissioner on building specifications and maintenance in the plan of operation of the Texas Windstorm Insurance Association (TWIA). Article 21.49 §6C also provides for the membership of the Committee, including public members who reside in a designated catastrophe area, three building industry members who reside in a designated catastrophe area, and three members representing the insurance industry who write insurance in the designated catastrophe areas.

The hearing is held pursuant to the Insurance Code, Article 21.49 §5A, which provides that the Commissioner, after notice and hearing, may issue any orders considered necessary to carry out the purposes of Article 21.49 (Catastrophe Property Insurance Pool Act), including, but not limited to, maximum rates, competitive rates, and policy forms. Any person may appear and testify for or against the proposed appointments.

TRD-200204771
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: July 29, 2002

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Texas Lottery Commission

Instant Game No. 296 "Money Mania"

1.0 Name and Style of Game.

A. The name of Instant Game No. 296 is "MONEY MANIA". The play style is a "match 3 with tripler, key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 296 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 296.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: $1.00, $2.00, $3.00, $5.00, $10.00, $20.00, $50.00, $100, $3,000, $30,000, GOLD BAR SYMBOL, COINS SYMBOL, DOLLAR BILL SYMBOL, DIAMOND SYMBOL, HORSESHOE SYMBOL, POT OF GOLD SYMBOL, SHAMROCK SYMBOL, CROWN SYMBOL, DOLLAR SIGN SYMBOL, and EMERALD SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 296 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$3,000	THR THOU
$30,000	30 THOU
GOLD BAR SYMBOL	TRIPLE
COIN SYMBOL	COIN
DOLLAR BILL SYMBOL	BILL
DIAMOND SYMBOL	DMND
HORSESHOE SYMBOL	SHOE
POT OF GOLD SYMBOL	GOLD
CLOVER SYMBOL	CLVR
CROWN SYMBOL	CRWN
DOLLAR SIGN SYMBOL	DLLR
EMERALD SYMBOL	EMLD

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 296 - 1.2E

CODE	PRIZE
THR	$3.00
SVN	$7.00
NIN	$9.00
TWL	$12.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $3.00, $7.00, $9.00, $12.00, $15.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $100.

I. High-Tier Prize - A prize of $3,000 or $30,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A twenty-two (22) digit number consisting of the three (3) digit game number (296), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 124 within each pack. The format will be: 296-0000001-000.

L. Pack - A pack of "MONEY MANIA" Instant Game tickets contain 125 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be two (2) fanfold configurations for this game. Configuration A will show the front of ticket 000 and the back of ticket 124. Configuration B will show the back of ticket 000 and the front of ticket 124.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MONEY MANIA" Instant Game No. 296 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MONEY MANIA" Instant Game is determined once the latex on the ticket is scratched off to expose 23 (twenty-three) play symbols. In Game 1, if the player matches any of the MONEY BAG PRIZES to YOUR PRIZE, the player will win that prize. In Game 2, if the player gets 3 like amounts, the player will win that amount. If the player gets 2 like amounts and a gold bar symbol, the player will win triple that amount shown. In Game 3, if the player matches any of the YOUR SYMBOLS to the LUCKY SYMBOL, the player will win the prize shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 23 (twenty-three) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 23 (twenty-three) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 23 (twenty-three) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 23 (twenty-three) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning Your Symbols play symbols in Game 3.

C. No duplicate non-winning prize amounts in Game 1 or Game 3.

D. There will be no more than 2 pairs of like play symbols in Game 2.

E. There will be no four or more like play symbols in Game 2.

F. The Tripler symbol in Game 2 will never appear more than once on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "MONEY MANIA" Instant Game prize of $3.00, $7.00, $9.00, $12.00, $15.00, $20.00, $50.00, or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "MONEY MANIA" Instant Game prize of $3,000, or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MONEY MANIA" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MONEY MANIA" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MONEY MANIA" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,112,000 tickets in the Instant Game No. 296. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 296 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$3	929,070	6.58
$7	97,818	62.48
$9	97,802	62.49
$12	97,792	62.50
$15	97,802	62.49
$20	73,316	83.37
$50	50,929	120.01
$100	6,747	905.88
$3,000	18	339,555.56
$30,000	6	1,018,666.67

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.21. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 296 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 296, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204837

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 30, 2002

♦ ♦ ♦

Instant Game No. 301 "Looking for the Green"

1.0 Name and Style of Game.

A. The name of Instant Game No. 301 is "LOOKING FOR THE GREEN". The play styles are "match three with doubler, key number match with auto win ".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 301 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 301.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1.00, $2.00, $3.00, $5.00, $10.00, $15.00, $50.00, $100, $500, $1,000, $5,000, $50,000, DOUBLE DOLLAR SIGN SYMBOL, GOLD BAR SYMBOL, MONEY BAG SYMBOL, STACK OF BILLS SYMBOL, DOLLAR SIGN SYMBOL, DOLLAR BILL SYMBOL, and STAR SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 301 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$50,000	50 THOU
DOUBLE DOLLAR SIGN SYMBOL	DOUBLE
GOLD BAR SYMBOL	GOLD
MONEY BAG SYMBOL	$BAG
STACK OF BILLS SYMBOL	BILLS
DOLLAR SIGN SYMBOL	MONEY
DOLLAR BILL SYMBOL	DLLR
STAR SYMBOL	AUTO

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 301 - 1.2E

CODE	PRIZE
$5.00	FIV
$8.00	EGT
$10.00	TEN
$15.00	FTN
$20.00	TWN

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $8.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, or $500.

I. High-Tier Prize - A prize of $1,000, $5,000, $50,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (301), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 301-0000001-000.

L. Pack - A pack of "LOOKING FOR THE GREEN" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 000 and back of 074 while the other fold will shown the back of ticket 000 and front of 074.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "LOOKING FOR THE GREEN" Instant Game No. 301 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "LOOKING FOR THE GREEN" Instant Game is determined once the latex on the ticket is scratched off to expose 31 (thirty-one) play symbols. In Game 1, if the player gets three (3) like amounts, the player will win that amount. If the player gets two (2) like amounts and a double dollar sign symbol, the player will win double that amount. In Game 2, if the player matches 2 out of 3 symbols, the player will win $50 instantly. In Game 3, the player must scratch the entire play area. If any of the player's YOUR NUMBERS match either LUCKY NUMBER, the player will win the prize shown below. If the player gets a star symbol, the player will win that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 31 (thirty-one) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 31 (thirty-one) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 31 (thirty-one) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 31 (thirty-one) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Game 1: No four or more of a kind.

C. Game 2: The will never be 3 like symbols.

D. Game 3: Non-winning prize symbols will never be the same as the winning prize symbol.

E. Game 3: No duplicate non-winning prize symbols.

F. Game 3: No duplicate non-winning Your Numbers on a ticket.

G. Game 3: No prize amount in a non-winning spot will correspond with the Your Number play symbol (i.e. 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "LOOKING FOR THE GREEN" Instant Game prize of $5.00, $8.00, $10.00, $15.00, $20.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "LOOKING FOR THE GREEN" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "LOOKING FOR THE GREEN" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "LOOKING FOR THE GREEN" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "LOOKING FOR THE GREEN" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,110,775 tickets in the Instant Game No. 301. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 301 - 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$5	651,911	9.37
$8	162,954	37.50
$10	325,944	18.75
$15	244,395	25.00
$20	142,570	42.86
$50	81,477	75.00
$100	2,534	2,411.51
$500	1,476	4,140.09
$1,000	48	127,307.81
$5,000	18	339,487.50
$50,000	6	1,018,462.50

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.79. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 301 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 301, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204574
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 25, 2002

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Instant Game No. 304 "Frontier Fortune"

1.0 Name and Style of Game.

A. The name of Instant Game No. 304 is "FRONTIER FORTUNE". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 304 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 304.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $20.00, $50.00, $100, $200, $500, $1,000, $5,000, $50,000, STACK OF BILLS SYMBOL, NUGGET SYMBOL, TOP HAT SYMBOL, STAR SYMBOL, DIAMOND SYMBOL, MONEYBAG SYMBOL, POT OF GOLD SYMBOL, DOLLAR SIGN SYMBOL, CHIP SYMBOL, STACK OF COINS SYMBOL, BOOT SYMBOL, SADDLE SYMBOL, COWBOY HAT SYMBOL, SPUR SYMBOL, HORSE SYMBOL, HORSESHOE SYMBOL, BEEF SYMBOL, and STEER SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 304 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$500	FIV HUND
$1,000	ONE THOU
$5,000	FIV THOU
$50,000	50 THOU
STACK OF BILLS SYMBOL	BILLS
NUGGET SYMBOL	NUGGET
TOP HAT SYMBOL	TPHAT
STAR SYMBOL	WIN$10
DIAMOND SYMBOL	DIMD
MONEYBAG SYMBOL	$BAG
POT OF GOLD SYMBOL	GOLD
DOLLAR SIGN SYMBOL	MONY

MONEY CHIP SYMBOL	CHIP
STACK OF COINS SYMBOL	STAK
BOOT SYMBOL	BOOT
SADDLE SYMBOL	SADLE
COWBOY HAT SYMBOL	HAT
SPUR SYMBOL	SPUR
HORSE SYMBOL	HORSE
HORSESHOE SYMBOL	SHOE
BEEF SYMBOL	BEEF
STEER SYMBOL	STEER

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 304 - 1.2E

CODE	PRIZE
FIV	$5.00
EGT	$8.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $8.00, $10.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, $500.

I. High-Tier Prize - A prize of $1,000, $5,000, and $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (304), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 074 within each pack. The format will be: 304-0000001-000.

L. Pack - A pack of "FRONTIER FORTUNE" Instant Game tickets contain 75 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 000 and back of 074, while the other fold will show the back of ticket 000 and front of 074.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "FRONTIER FORTUNE" Instant Game No. 304 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "FRONTIER FORTUNE" Instant Game is determined once the latex on the ticket is scratched off to expose 47 (forty-seven) play symbols. In Game 1 (door play area), if any of the player's YOUR NUMBERS match either WINNING NUMBER, the player will win the prize shown. In Game 2 (single window play area), in each game, if the player's YOUR NUMBER beats THEIR NUMBER, the player will win the prize shown. In Game 3 (poster play area), if the player gets a star symbol, the player will win $10 automatically. In Game 4 (double window play area), in each game, if the player matches 3 like symbols, the player will win the prize shown. In Game 5 (bench play area), if the player matches 3 like symbols, the player will win the prize shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 47 (forty-seven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 47 (forty-seven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 47 (forty-seven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 47 (forty-seven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. Although not all prizes can be won in each game, all prize symbols may be used in non-winning locations.

C. Game 1: No duplicate Winning Numbers on a ticket.

D. Game 1: No duplicate non-winning prize symbols.

E. Game 1: No duplicate non-winning Your Number play symbols.

F. Game 2: No duplicate non-winning Yours play symbols.

G. Game 2: No duplicate non-winning Theirs play symbols.

H. Game 2: No duplicate non-winning prize symbols.

I. Game 2: No ties within a row.

J. Game 2: No duplicate games.

K. Game 4: No duplicate non-winning prize symbols.

L. Game 4: No ticket will contain 2 or more pairs of like symbols.

M. Game 5: There will be no 4 or more like play symbols.

N. Game 5: No ticket will contain 2 or more pairs of like symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "FRONTIER FORTUNE" Instant Game prize of $5.00, $8.00, $10.00, $20.00, $50.00, $100, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form

and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "FRONTIER FORTUNE" Instant Game prize of $1,000, $5,000, or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "FRONTIER FORTUNE" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "FRONTIER FORTUNE" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "FRONTIER FORTUNE" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,108,900 tickets in the Instant Game No. 304. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 304 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5	732,952	8.33
$8	569,934	10.72
$10	489,004	12.49
$20	142,516	42.86
$50	39,768	153.61
$100	6,658	917.53
$500	1,313	4,652.63
$1,000	240	25,453.75
$5,000	24	254,537.50
$50,000	4	1,527,225.00

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.08. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 304 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 304, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204836
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 30, 2002

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Instant Game No. 306 "Money Island"

1.0 Name and Style of Game.

A. The name of Instant Game No. 306 is "MONEY ISLAND". The play style is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 306 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 306.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1.00, $2.00, $4.00, $6.00, $10.00, $20.00, $50.00, $200, $1,000, $2,000, $20000, and SHELL SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Table 1 of this section

Figure 1: GAME NO. 306 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$1,000	ONE THOU
$2,000	TWO THOU
$20,000	20 THOU
SHELL SYMBOL	AUTO

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 306 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
SIX	$6.00
EGT	$8.00
TEN	$10.00
TWL	$12.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $200.

I. High-Tier Prize - A prize of $1,000, $2,000, and $20,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (306), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 306-0000001-000.

L. Pack - A pack of "MONEY ISLAND" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000 and 001 will be on the top page, tickets 002 and 003 will be on the next page and so forth and tickets 248 and 249 will be on the last page. Please note, the books will be in an A-B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "MONEY ISLAND" Instant Game No. 306 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "MONEY ISLAND" Instant Game is determined once the latex on the ticket is scratched off to expose eighteen (18) play symbols. If any of the player's ISLAND NUMBERS match either of the MAINLAND NUMBERS, the player will win the prize shown below the matching ISLAND NUMBER(S). If the player reveals a shell symbol on any island, the player will win the prize shown below automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly eighteen (18) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly eighteen (18) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the eighteen (18) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the eighteen (18) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No three or more line non-winning prize symbols on a ticket.

C. Non-winning prize symbols will not match a winning prize symbol on a ticket.

D. No duplicate Mainland Numbers on a ticket.

E. There will be no correlation between the matching symbols and the prize amount.

F. The auto win symbol will never appear more than once on a ticket.

G. No duplicate non-winning Island Number play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "MONEY ISLAND" Instant Game prize of $1.00, $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00, $50.00 or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "MONEY ISLAND" Instant Game prize of $1,000, $2,000, or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MONEY ISLAND" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "MONEY ISLAND" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "MONEY ISLAND" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall

be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 8,196,500 tickets in the Instant Game No. 306. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 306 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	754,050	10.87
$4	483,587	16.95
$6	139,321	58.83
$8	32,786	250.00
$10	73,775	111.10
$12	82,032	99.92
$20	57,342	142.94
$50	32,786	250.00
$200	6,850	1,196.57
$1,000	30	273,216.67
$2,000	24	341,520.83
$20,000	8	1,024,562.50

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.93. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 306 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 306, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204838
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 30, 2002

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Instant Game 308 "Texas Tailgaters"

1.0 Name and Style of Game.

A. The name of Instant Game No. 308 is "TEXAS TAILGATERS". The play style is "beat score with win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 308 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 308.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, $1.00, $2.00, $3.00, $7.00, $10.00, $14.00, $21.00, $49.00, $100, $1,000, $3,000, HOT DOG SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 308 - 1.2D

PLAY SYMBOL	CAPTION
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRTN
14	FRTN
15	FFTN
16	SXTN
17	SVTN
18	EGTN
19	NITN
20	TWY
21	TWON
22	TWTW
23	TWTR
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWEG
29	TWNI
30	THTY
31	TRON
32	TRTW
33	TRTR
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TREG
39	TRNI
40	FRTY
$1.00	ONE$
$2.00	TWO$
$3.00	THREE$
$7.00	SEVEN$
$10.00	TEN$
$14.00	FORTN
$21.00	TWY ONE

$49.00	FRYNIN
$100	ONE HUND
$1,000	ONE THOU
$3,000	THR THOU
HOT DOG SYMBOL	WIN4

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 308 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
THR	$3.00
SVN	$7.00
TEN	$10.00
FRN	$14.00
TWE	$21.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $3.00, $7.00, $10.00, $14.00.

H. Mid-Tier Prize - A prize of $21.00, $49.00, or $100.

I. High-Tier Prize - A prize of $3,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (308), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 308-0000001-000.

L. Pack - A pack of "TEXAS TAILGATERS" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000-004 will be on the first page, tickets 005-009 will be on the next page and so forth with tickets 245-249 on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "TEXAS TAILGATERS" Instant Game No. 308 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.308, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "TEXAS TAILGATERS" Instant Game is determined once the latex on the ticket is scratched off to expose 12 (twelve) play symbols. If the player's YOUR SCORE beats THEIR SCORE within a quarter, the player will win the prize for that quarter. If the player gets a hot dog symbol under the YOUR SCORE spot the player will automatically win all four prizes. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 12 (twelve) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 12 (twelve) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 12 (twelve) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 12 (twelve) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate Yours or Theirs play symbols on a ticket.

C. No duplicate non-winning prize symbols on a ticket.

D. No ties between Yours and Theirs in a game.

E. When the hot dog symbol appears in a game, the other three games will be non-winning plays.

2.3 Procedure for Claiming Prizes.

A. To claim a "TEXAS TAILGATERS" Instant Game prize of $1.00, $2.00, $3.00, $7.00, $10.00, $14.00, $21.00, $49.00, or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $49.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "TEXAS TAILGATERS" Instant Game prize of $3,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TEXAS TAILGATERS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "TEXAS TAILGATERS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "TEXAS TAILGATERS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 308. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 308 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1	1,048,357	9.62
$2	604,812	16.67
$3	241,906	41.67
$7	80,613	125.04
$10	60,497	166.62
$14	40,320	250.00
$21	40,320	250.00
$49	7,127	1,414.34
$100	84	120,000.00
$3,000	42	240,000.00

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.75. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 308 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 308, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204959
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 31, 2002

♦ ♦ ♦

Instant Game No. 312 "Diamond Dollars"

1.0 Name and Style of Game.

A. The name of Instant Game No. 312 is "DIAMOND DOLLARS". The play style is a "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 312 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 312.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $300, $1,000, $3,000, $30,000, and DIAMOND SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 312 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$300	THR HUND
$1,000	ONE THOU
$3,000	THR THOU
$30,000	30 THOU
DIAMOND SYMBOL	WIN$50

Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 312 - 1.2E

CODE	PRIZE
$2.00	TWO
$4.00	FOR
$8.00	EGT
$10.00	TEN
$20.00	TWN

E. Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be : 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $8.00, $10.00, $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, or $300.

I. High-Tier Prize - A prize of $3,000 or $30,000.

J. Bar Code - A 22 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (312), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 312-0000001-000.

L. Pack - A pack of "DIAMOND DOLLARS" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000-001 will be on the top page. Tickets 002-003 will be on the next page and so forth and tickets 248-249 will be on the last page. The books will be in an A - B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "DIAMOND DOLLARS" Instant Game No. 312 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "DIAMOND DOLLARS" Instant Game is determined once the latex on the ticket is scratched off to expose twenty-two (22) play symbols. If the player matches any of the YOUR NUMBERS to either WINNING NUMBER, the player will win the prize shown for that number. If the player gets a diamond symbol under YOUR NUMBER, the player will win $50 automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly twenty-two (22) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly twenty-two (22) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the twenty-two (22) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the twenty-two (22) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning Your Numbers play symbols on a ticket.

C. No duplicate Winning Numbers play symbols on a ticket.

D. No 3 or more like non-winning prize symbols on a ticket .

E. The diamond symbol will appear once on a winning ticket.

F. The $50 prize symbol will not appear on losing or non-diamond win tickets.

2.3 Procedure for Claiming Prizes.

A. To claim a "DIAMOND DOLLARS" Instant Game prize of $2.00, $4.00, $8.00, $10.00, $20.00, $50.00, $100, or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "DIAMOND DOLLARS" Instant Game prize of $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "DIAMOND DOLLARS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "DIAMOND DOLLARS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "DIAMOND DOLLARS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 12,098,000 tickets in the Instant Game No. 312. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 312 - 4.0

Prize Amount	Approximate Number of Prizes*	Approximate Odds are 1 in **
$2	1,233,991	9.80
$4	629,107	19.23
$8	302,447	40.00
$10	217,777	55.55
$20	96,777	125.01
$50	48,392	250.00
$100	7,039	1,718.71
$300	2,014	6,006.95
$3,000	65	186,123.08
$30,000	9	1,344,222.22

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.77. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 312 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 312, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204573

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 25, 2002

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Instant Game No. 714 "Spin & Win"

1.0 Name and Style of Game.

A. The name of Instant Game No. 714 is "SPIN & WIN". The play style is a "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 714 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 714.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, $1.00, $2.00, $4.00, $6.00, $10.00, $20.00, $50.00, $200, $1,000, $3,000, $30,000, and MONEY BAG SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 714 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SEV
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO HUND
$1,000	ONE THOU
$3,000	THR THOU
$30,000	30 THOU
MONEY BAG SYMBOL	WIN

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Table 2 of this section

Figure 2: GAME NO. 714 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
SIX	$6.00
EGT	$8.00
TEN	$10.00
TWL	$12.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $200.

I. High-Tier Prize - A prize of $1,000, $3,000, or $30,000

J. Bar Code - A 20 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number and eight (8) digits of the Validation Number and a two (2) digit filler. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (714), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 714-0000001-000.

L. Pack - A pack of "SPIN & WIN" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 to 001 will show on the front of the pack. The backs of tickets 248 to 249 will show. Every other book will be opposite.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SPIN & WIN" Instant Game No. 714 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SPIN & WIN" Instant Game is determined once the latex on the ticket is scratched off to expose 19 (nineteen) play symbols. If any of the player's Your Numbers match one of the three (3) Lucky Numbers, the player will win the prize amount shown for that number. If the player gets a money bag symbol, the player will win that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 19 (nineteen) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 19 (nineteen) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 19 (nineteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 19 (nineteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. Non-winning prize symbols will not match a winning prize symbol on a ticket.

C. No duplicate LUCKY NUMBERS on a ticket.

D. A Your Number will never equal the corresponding Prize symbol.

E. The auto win symbol will never appear more than once on a ticket.

F. The auto win symbol will only appear on winning tickets.

G. The auto win symbol will never appear as any of the Lucky Numbers.

H. No duplicate non-winning Your Number play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "SPIN & WIN" Instant Game prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00, $50.00, or $200, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00 or $200 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "SPIN & WIN" Instant Game prize of $1,000, $3,000, or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SPIN & WIN" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SPIN & WIN" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SPIN & WIN" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,186,750 tickets in the Instant Game No. 714. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 714 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	477,186	10.87
$4	306,048	16.95
$6	88,163	58.83
$8	20,747	250.00
$10	46,686	111.10
$12	51,852	100.03
$20	36,311	142.84
$50	19,236	269.64
$200	4,325	1,199.25
$1,000	86	60,311.05
$3,000	15	345,783.33
$30,000	3	1,728,916.67

*The number of actual winners may vary based on sales, distribution, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.94. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 714 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 714, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204572

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 25, 2002

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Instant Game No. 716 "Spicy Hot Cash"

1.0 Name and Style of Game.

A. The name of Instant Game No. 716 is "SPICY HOT CASH". The play style is a "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 716 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 716.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $20.00, $50.00, $100, $300, $1,000, $3,000, $20,000, and FLAME SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 716 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$300	THR HUND
$1,000	ONE THOU
$3,000	THR THOU
$20,000	20 THOU
FLAME SYMBOL	DBL

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Table 2 of this section

Figure 2: GAME NO. 716 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
EGT	$8.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $2.00, $4.00, $8.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, or $300.

I. High-Tier Prize - A prize of $3,000 or $20,000

J. Bar Code - A 20 character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number and eight (8) digits of the Validation Number and a two (2) digit filler. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A thirteen (13) digit number consisting of the three (3) digit game number (716), a seven (7) digit pack number and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 716-0000001-000.

L. Pack - A pack of "SPICY HOT CASH" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of two. Tickets 000 to 001 will show on the front of the pack. The backs of tickets 248 to 249 will show. Every other book will be opposite.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "SPICY HOT CASH" Instant Game No. 716 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "SPICY HOT CASH" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) play symbols. If the player matches any of the YOUR NUMBERS to either LUCKY NUMBER, the player will win the prize amount shown for that number. If the player gets a flame symbol, the player will win double that prize automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets within a book will not have identical patterns.

B. Non-winning prize symbols will not match a winning prize symbol on a ticket.

C. No duplicate LUCKY NUMBERS on a ticket.

D. A Your Number will never equal the corresponding Prize symbol.

E. The doubler symbol will never appear more than once on a ticket.

F. The doubler symbol will only appear on winning tickets.

G. The doubler symbol will never appear as either of the Lucky Numbers.

H. No duplicate non-winning Your Number play symbols on a ticket.

I. No prize symbol will appear more than 2 times on a non-winning ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "SPICY HOT CASH" Instant Game prize of $2.00, $4.00, $8.00, $10.00, $20.00, $50.00, $100, or $300, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $300 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "SPICY HOT CASH" Instant Game prize of $3,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "SPICY HOT CASH" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "SPICY HOT CASH" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "SPICY HOT CASH" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,186,750 tickets in the Instant Game No. 716. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 716 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	539,453	9.61
$4	311,203	16.67
$8	165,948	31.26
$10	82,957	62.52
$20	41,518	124.93
$50	10,828	479.01
$100	4,828	1,074.31
$300	863	6,010.14
$3,000	24	216,114.58
$20,000	3	1,728,916.67

*The number of actual winners may vary based on sales, distribution, and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.48. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 716 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 716, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200204575

Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: July 25, 2002

♦ ♦ ♦

Manufactured Housing Division

Notice of Administrative Hearing (MHD2000001843-WP)

Tuesday, August 20, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor,

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. American Homestar of Burleson to hear alleged violations of Sections 14(f) and 14(j) of the Act and Sections 80.131(b) and 80.132(3) of the Rules by not properly complying with the initial report and warranty orders of the Director and provide the Department with copies of completed work orders in a timely manner. SOAH 332-02-3577. Department MHD2000001843-WP.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200204580
Bobbie Hill
Executive Director
Manufactured Housing Division
Filed: July 25, 2002

♦ ♦ ♦

Notice of Administrative Hearing (MHD2000001843-WP)

Tuesday, August 20, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor,

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Nationwide Housing Systems L.P. dba Nationwide Mobile Homes to hear alleged violations of Sections 14(f) and 14(j) of the Act and Sections 80.131(b) and 80.132(3) of the Rules by not properly complying with the initial report and warranty orders of the Director and provide the Department with copies of completed work orders in a timely manner. SOAH 332-02-3578. Department MHD2000001843-WP.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200204581
Bobbie Hill
Executive Director
Manufactured Housing Division
Filed: July 25, 2002

♦ ♦ ♦

Notice of Administrative Hearing (MHD2001001076-W and MHD2002000851-W)

Wednesday, August 28, 2002, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor,

Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Clint James Luksa dba Clint J. Luksa Mobile Homes to hear alleged violations of Sections 14(f) and 14(j) of the Act and Sections 80.131(b) and 80.132(3) of the Rules by not properly complying with the initial report and warranty orders of the Director and provide the Department with copies of completed work orders in a timely manner. SOAH 332-02-3610. Department MHD2001001076-W and MHD2002000851-W.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200204583
Bobbie Hill
Executive Director
Manufactured Housing Division
Filed: July 25, 2002

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Enforcement Orders

An agreed order was entered regarding Red River Army Depot, Docket No. 1999-1397-MLM-E on July 15, 2002 assessing $12,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Elisa Roberts, Staff Attorney at (512) 239-6939, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding United Petroleum Transports, Incorporated, Docket No. 2001-1348-PST-E on July 15, 2002 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Lawrence King, Enforcement Coordinator at (512) 339-2929, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chapman, Inc., Docket No. 2001-1321-PST-E on July 15, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Susan Kelly, Enforcement Coordinator at (409) 899-8704, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Casco Hauling, & Excavating Co., Docket No. 2001- 0931-MSW-E on July 15, 2002 assessing $47,850 in administrative penalties with $9,570 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cahill Country Water Supply Corporation, Docket No. 2001-1492-PWS-E on July 15, 2002 assessing $1,750 in administrative penalties with $350 deferred.

Information concerning any aspect of this order may be obtained by contacting Chris Friesenhahn, Enforcement Coordinator at (512) 239-4471, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Allen Car Wash Partners, Ltd. dba Waterfall Carwash No. 1, Docket No. 2001-1033-PST-E on July 15, 2002 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting John Mead, Enforcement Coordinator at (512) 239-6010, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jack Vanden Berge dba Vanden Berge Dairy, Docket No. 2001-0955-AGR-E on July 15, 2002 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Bradley Brock, Enforcement Coordinator at (512) 239-1165, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding United States Gypsum Company, Docket No. 2001- 1147-AIR-E on July 15, 2002 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Gloria Stanford, Enforcement Coordinator at (512) 239-1871, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aquila Gas Pipeline Corporation, Docket No. 2001- 1180-AIR-E on July 15, 2002 assessing $5,625 in administrative penalties with $1,125 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shahnoor Corporation, Docket No. 2001-0895-PST-E on July 15, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jones Court, Ltd. dba Jones Court Retail Center, Docket No. 2001-1367-PWS-E on July 15, 2002 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Elvia Maske, Enforcement Coordinator at (512) 239-0789, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shell Oil Company, Docket No. 2001-0548-IHW-E on July 15, 2002 assessing $16,500 in administrative penalties with $3,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Gerberding, Enforcement Coordinator at (512) 239-4490, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sonora Independent School District, Docket No. 2002- 0014-PST-E on July 15, 2002 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Mark Newman, Enforcement Coordinator at (915) 655-9479, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sun Coast Resources, Inc., Docket No. 2001-1537-PST- E on July 15, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Jonathan Walling, Enforcement Coordinator at (713) 767-3612, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Tulia, Docket No. 2001-0992-AIR-E on July 15, 2002 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding United Services Automobile Association, Docket No. 2002-0016-PST-E on July 15, 2002 assessing $750 in administrative penalties with $150 deferred.

Information concerning any aspect of this order may be obtained by contacting Mark Newman, Enforcement Coordinator at (915) 655-9479, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Victoria County Water Control & Improvement District No. 1, Docket No. 2001-0494-MLM-E on July 15, 2002 assessing $9,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Princeton, Docket No. 2001-1169-PST-E on July 15, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Gerberding, Enforcement Coordinator at (512) 239-4490, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Champion Coatings, Inc., Docket No. 2001-1306-AIR-E on July 15, 2002 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Kevin Keyser, Enforcement Coordinator at (713) 422-8938, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding B&B Aggregates, Inc., Docket No. 2001-1276-MWD-E on July 15, 2002 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (713) 767-3607, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lukes Mobile Home Park, Inc., Docket No. 2001-1291- PWS-E on July 15, 2002 assessing $938 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding New Braunfels Independent School District, Docket No. 2001-1174-EAQ-E on July 15, 2002 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Petro Stopping Centers, L.P. dba Petro Stopping Center #5, Docket No. 2001-1094-PST-E on July 15, 2002 assessing $20,000 in administrative penalties with $4,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cummins Southern Plains, Inc., Docket No. 2001-1105- PST-E on July 15, 2002 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Sandy Van Cleave, Enforcement Coordinator at (512) 239-0667, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gaither Petroleum Corporation, Docket No. 2001-1188- AIR-E on July 15, 2002 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lanar, Inc. dba Three Corners Food Store, Docket No. 2001-1192-PST-E on July 15, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Burnet, Docket No. 2001-1293-PST-E on July 15, 2002 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Bill Davis, Enforcement Coordinator at (512) 239-6793, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Claybrook Services, Inc., Docket No. 2001-1157-PST-E on July 15, 2002 assessing $6,300 in administrative penalties with $1,260 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Baumgartner, Enforcement Coordinator at (361) 825-3312, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding East Texas Petroleum Company, Inc., Docket No. 2001- 1538-PST-E on July 15, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Jaime Garza, Enforcement Coordinator at (956) 430-6030, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hondo Creek Cattle Company, Docket No. 2001-0009- AIR-E on July 15, 2002 assessing $3,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Pamela Campbell, Enforcement Coordinator at (412) 239-4493, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding John Leyendekker dba John Leyendekker Dairy, Docket No. 2001-1109-AGR-E on July 15, 2002 assessing $1,350 in administrative penalties with $270 deferred.

Information concerning any aspect of this order may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-0468, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oklahoma Tank Lines Inc., Docket No. 2001-1413-PST- E on July 15, 2002 assessing $500 in administrative penalties with $100 deferred.

Information concerning any aspect of this order may be obtained by contacting Bradley Brock, Enforcement Coordinator at (512) 239-1165, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Balch Oil Co., Inc., Docket No. 2001-0998-PST-E on July 15, 2002 assessing $6,000 in administrative penalties with $3,600 deferred.

Information concerning any aspect of this order may be obtained by contacting Mark Newman, Enforcement Coordinator at (915) 655-9479, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Woodcreek Utilities, Inc., Docket No. 2001-1146-MWD- E on July 15, 2002 assessing $11,250 in administrative penalties with $2,250 deferred.

Information concerning any aspect of this order may be obtained by contacting Robert Mikesh, Enforcement Coordinator at (512) 339-2929, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of El Paso, Docket No. 2001-0363-AIR-E on July 15, 2002 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ATOFINA Petrochemicals, Inc., Docket No. 2002-0148- AIR-E on July 15, 2002 assessing $22,500 in administrative penalties with $4,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Laura Clark, Enforcement Coordinator at (409) 899-8760, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Junction, Docket No. 2000-1293-MWD-E on July 15, 2002 assessing $5,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oceaneering International, Inc., Docket No. 2001-1052- MWD-E on July 15, 2002 assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kevin Keyser, Enforcement Coordinator at (713) 422-8938, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Paloma Cimarron Hills, L.P., Docket No. 2001-1428- MWD-E on July 15, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Sherry Smith, Enforcement Coordinator at (512) 239-0572, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Frank Brand dba Frank Brand Dairy, Docket No. 2001- 1016-AGR-E on July 15, 2002 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Laurie Eaves, Enforcement Coordinator at (512) 239-4495, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Atlantic Oil & Gas, Inc., Docket No. 2001-1198-PST-E on July 15, 2002 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Alita Champagne, Enforcement Coordinator at (512) 239-0784, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Aristech Chemical Corporation, Docket No. 2001-0436- AIR-E on July 15, 2002 assessing $36,000 in administrative penalties with $7,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Richard Lambert dba Romayors Grocery, Docket No. 2001-1385-PWS-E on July 15, 2002 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Stewart, Enforcement Coordinator at (512) 239-6684, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Y Propane Service, Inc., Docket No. 2001-0668-PST-E on July 15, 2002 assessing $18,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brian Keith Zuk, Docket No. 2001-0609-OSI-E on July 15, 2002 assessing $500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Darren Ream, Staff Attorney at (817) 588-5878, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ian Rowland dba Shovel Mountain Ranch Subdivision, Docket No. 2001-1181-PWS-E on July 15, 2002 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shannon Strong, Staff Attorney at (512) 239-6201, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding David Davis, Debbie Davis, Tammy Graham and David Smelley, Docket No. 2001-0830-AGR-E on July 15, 2002 assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Nash Petty, Staff Attorney at (512) 239-3693, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200204943
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: July 31, 2002

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Enforcement Orders

An agreed order was entered regarding Richard Crane dba Rick's By The Park, Docket No. 2000-1125-PST-E on July 26, 2002 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Elisa Roberts, Staff Attorney at (512) 239-6939, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lakeview Water Co-Op, Docket No. 2001-0313-pws-e on July 26, 2002 assessing $2,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Wendy Cooper, Enforcement Coordinator at (817) 588-5867, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TXU U.S. Holdings Company formerly known as TXU Electric Company, Docket No. 2001-1327-AIR-E on July 26, 2002 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Fox, Enforcement Coordinator at (817) 588-5825, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cypress Bible Church of Harris County, Docket No. 2001-1290-PWS-E on July 26, 2002 assessing $938 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kent Heath, Enforcement Coordinator at (512) 239-4575, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Denton, Docket No. 2001-1260-AIR-E on July 26, 2002 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Wendy Cooper, Enforcement Coordinator at (817) 588-5867, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HEC Petroleum, Inc., Docket No. 2001-1499-AIR-E on July 26, 2002 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Sherman, Enforcement Coordinator at (713) 767-

3624, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron U.S.A. Inc., Docket No. 2001-1496-PST-E on July 26, 2002 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Sherman, Enforcement Coordinator at (713) 767-3624, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cibolo Creek Municipal Authority, Docket No. 2001- 0896-MWD-E on July 26, 2002 assessing $10,000 in administrative penalties with $2,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Nustar Joint Venture operated by Enogex Products Corporation, Docket No. 2001-1205-AIR-E on July 26, 2002 assessing $13,163 in administrative penalties with $2,633 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mitchell Gas Services L.P., Docket No. 2001-1420-AIR- E on July 26, 2002 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting Carolyn Easley, Enforcement Coordinator at (915) 698-9674, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Josh Jumbo Corporation dba Sonic Quick Stop, Docket No. 2001-1126-PST-E on July 26, 2002 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Kevin Keyser, Enforcement Coordinator at (713) 422-8938, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Total Roll-Offs, L.L.C., Docket No. 2001-1071-MSW-E on July 26, 2002 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michael Limos, Enforcement Coordinator at (512) 239-5839, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Philip Clemente ba Northeast Mobile Home Park, Docket No. 2001-1473-PWS-E on July 26, 2002 assessing $2,188 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Michelle Harris, Enforcement Coordinator at (512) 239-0492, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oasis Pipe Line Company Texas L.P., Docket No. 2001- 1545-AIR-E on July 26, 2002 assessing $7,500 in administrative penalties with $1,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Dan Landenberger, Enforcement Coordinator at (915) 570-1359, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Prestigious Accessories, Inc., Docket No. 2001-1074- AIR-E on July 26, 2002 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rebel Enterprises, Inc. dba Rebel Food, Docket No. 2001-1040-PST-E on July 26, 2002 assessing $8.000 in administrative penalties with $1,600 deferred.

Information concerning any aspect of this order may be obtained by contacting John Barry, Enforcement Coordinator at (409) 899-8781, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 249, Docket No. 2001-1210-MWD-E on July 26, 2002 assessing $11,500 in administrative penalties with $2,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bahrami Enterprises, L.L.C. dba Minit Mart, Docket No. 2001-1392-PST-E on July 26, 2002 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting A Sunday Udoetok, Enforcement Coordinator at (512) 239-0739, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Gainesville, Docket No. 2001-0984-MWD-E on July 26, 2002 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Parks and Wildlife Department, Docket No. 2001- 0766-MWD-E on July 26, 2002 assessing $25,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katharine Hodgins, SEP Coordinator at (512) 239-5731, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Blooming Grove, Docket No. 2001-1184-PWS-E on July 26, 2002 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Erika Fair, Enforcement Coordinator at (512) 239-6673, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mark Stewart and Dona B. Stewart dba Stewart Water, Docket No. 2001-0528-PWS-E on July 26, 2002 assessing $125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Gilbert Angelle, Enforcement Coordinator at (512) 239-4489, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding George Ted DeVries dba DeVries Dairy, Docket No. 2001-0791-AGR-E on July 26, 2002 assessing $4,375 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robin Chapman, Staff Attorney at (512) 239-0497, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Lee Ward dba Ward's Trucking, Docket No. 2001-1101- MSW-E on July 26, 2002 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Okpohworho, Staff Attorney at (713) 422-8918, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200204944
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: July 31, 2002

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Invitation to Comment - Draft July 2002 Update to the Water Quality Management Plan for the State of Texas

The Texas Natural Resource Conservation Commission (TNRCC or commission) announces the availability of the draft *July 2002 Update to the Water Quality Management Plan for the State of Texas* (draft July 2002 WQMP update).

The Water Quality Management Plan (WQMP) is developed and promulgated in accordance with Federal Clean Water Act (CWA), Chapter 208. The draft July 2002 WQMP update includes projected effluent limits of indicated domestic dischargers useful for water quality management planning in future permit actions. Once the commission certifies a WQMP update, the update is submitted to the United States Environmental Protection Agency (EPA) for approval. For some Texas pollutant discharge elimination system (TPDES) permits, the EPA's approval of a corresponding WQMP update is a necessary precondition to TPDES permit issuance by the commission. The draft July 2002 WQMP update also contains service area populations for listed wastewater treatment facilities, and designated management agency information.

A copy of the draft July 2002 WQMP update may be found on the commission's webpage located at *http://www.tnrcc.state.tx.us/permitting/waterperm/wqmp/index.html*. A copy of the draft may also be viewed at the TNRCC Library located at Texas Natural Resource Conservation Commission, Building A, 12100 Park 35 Circle, North Interstate 35, Austin, Texas.

Written comments may be submitted to Ms. Nancy Vignali, TNRCC, Water Quality Division, MC 150, P.O. Box 13087, Austin, Texas 78711-3087. Comments may also be faxed to (512) 239-4420, but must be followed up with the submission and receipt of the written comments within three working days of when they were faxed. Written comments must be submitted no later than 5:00 p.m. on September 9, 2002. For further information or questions, please contact Ms. Vignali at (512) 239-1303 or by e-mail at *nvignali@tnrcc.state.tx.us*.

TRD-200204883
Stephanie Bergeron
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: July 31, 2002

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Notice of Application and Preliminary Decision for a Industrial Waste Permit

For The Period of July 25, 2002

APPLICATION Safety-Kleen (Deer Park) Inc., a commercial hazardous waste management facility, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a Class 3 permit modification to authorize vertical expansion of the North Landfill by adding stability dikes, modify current landfill design and material substitutions for the landfill and cover system, and increase of North Landfill permitted waste volume from 662,302 to 815,000 cubic yards. The facility is located at 2027 Battleground Road near the intersection of State Highways 134 and 225 on approximately 86 acres in Deer Park, Harris County, Texas 77536. This application was submitted to the TNRCC on August 30, 2001.

The TNRCC executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals.

The TNRCC executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the Deer Park Public Library, 3009 Center Street, Deer Park, Texas.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TNRCC will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application, if requested in writing by an affected person, or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 45 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or requested to be on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on

issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comments may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the permit and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TNRCC Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us. The permittee's compliance history during the life of the permit being modified is available from the Office of Public Assistance.

Further information may also be obtained from Safety-Kleen (Deer Park) Inc., P.O. Box 609, Deer Park, Texas 77536 or by calling Mr. Timothy Kent at 281-930-2300.

TRD-200204942
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: July 31, 2002

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Notice of Application and Preliminary Decision for a Municipal Solid Waste Permit

For The Period of July 25, 2002

APPLICATION IESI TX GP Corporation, General Partner for IESI TX Landfill LP, 6125 Airport Freeway, Suite 202 Haltom City, Tarrant County, Texas, has applied to the Texas Natural Resource Conservation Commission (TNRCC) for a permit to authorize a new Type V municipal solid waste transfer station facility that would be authorized to accept municipal solid waste, non- hazardous Class 2 and Class 3 industrial wastes, yard wastes, and special wastes in accordance with the approved Waste Acceptance Plan (WAP). The proposed site is a 3.34 acre facility, located approximately 800 feet east of the intersection of Patterson St. and Roach St. in Bowie, Montague County, Texas. The mailing address is 1201 E. Roach Road #4, Bowie, Texas, 76230. This application was submitted to the TNRCC on February 19, 2002.

The TNRCC executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this proposed permit, if issued, meets all statutory and regulatory requirements. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the Bowie City Hall, 304 Lindsey Street, Bowie, Texas 76230.

MAILING LISTS. You may ask to be placed on a mailing list to obtain additional information regarding this application by sending a request to the Office of the Chief Clerk at the address below. You may also ask to be on a county-wide mailing list to receive public notices for TNRCC permits in the county.

PUBLIC COMMENT / PUBLIC MEETING. The TNRCC held a public meeting at 7:00 pm on May 7, 2002, at the Bowie City Hall in Bowie, Texas. You may submit public comments or request another public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comment or to ask questions about the application. The TNRCC will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

You may submit additional written public comment to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087 within 30 days from the date of newspaper publication of this notice. OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or who requested to be on a mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comments may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the permit and will forward the application and requests to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

Further information may also be obtained from the Bowie City Hall at the address stated above or by calling the City Offices at (940) 872-1114.

TRD-200204941
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: July 31, 2002

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (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 commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **September 16, 2002**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission 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 proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on September 16, 2002**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Azman, Incorporated dba Shoppers Mart 2; DOCKET NUMBER: 2002-0120- PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 17143; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(1) and THSC, §382.085(b), by failing to perform the initial testing of the Stage II Vapor recovery system; and 30 TAC §334.22, by failing to make payment of annual and associated late underground storage tank (UST) fees; PENALTY: $800; ENFORCEMENT COORDINATOR: Sandra Hernandez, (956) 425-6010; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: BP America Production Company; DOCKET NUMBER: 2002-0740-AIR-E; IDENTIFIER: Air Account Number YA-0050-L and Title V Federal Operating Permit Number O- 00549; LOCATION: Denver City, Yoakum County, Texas; TYPE OF FACILITY: separation plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit the Title V compliance certification; and 30 TAC §122.145(2)(C) and THSC, §382.085(b), by failing to submit the Title V deviation report; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(3) COMPANY: Big Chief Distributing Company; DOCKET NUMBER: 2002-0437-PST-E; IDENTIFIER: Enforcement Identification Number 17663; LOCATION: Temple, Bell County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(4) COMPANY: David W. Black; DOCKET NUMBER: 2001-1554-OSI-E; IDENTIFIER: On- Site Sewage Facility (OSSF) Installer Number OS3798; LOCATION: Abilene, Taylor County, Texas; TYPE OF FACILITY: septic system installation; RULE VIOLATED: 30 TAC §285.61(4) and (5), and THSC, §366.051(c), by failing to obtain proof of a permit prior to installation of an OSSF and notify the permitting authority of the date on which the installation would begin; PENALTY: $400; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(5) COMPANY: Ana, Inc. dba C & M Grocery; DOCKET NUMBER: 2002-0212-PST-E; IDENTIFIER: PST Facility Identification Number 0057253; LOCATION: Rosharon, Brazoria County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a) and the Code, §26.3475(d), by failing to have correction protection for the UST system; 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.3467(a), by failing to submit UST registration and self-certification and make available a valid, current delivery certificate; and 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Kevin Keyser, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: C.P. Transport, Inc.; DOCKET NUMBER: 2002-0681-PST-E; IDENTIFIER: Enforcement Identification Number 17967; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner had a valid, current delivery certificate; PENALTY: $400; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: C & R Distributing, Inc.; DOCKET NUMBER: 2002-0422-PST-E; IDENTIFIER: Enforcement Identification Number 17956; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner had a valid, current delivery certificate; PENALTY: $625; ENFORCEMENT COORDINATOR: Kevin Smith, (915) 834-4949; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(8) COMPANY: Antonio Castillo dba A. Castillo & Sons Dump Trucking; DOCKET NUMBER: 2002-0383-MSW-E; IDENTIFIER: Municipal Solid Waste Identification Number HAW001; LOCATION: Hebbronville, Jim Hogg County, Texas; TYPE OF FACILITY: dump trucking service; RULE VIOLATED: 30 TAC §330.32(b), by allegedly having transported and disposed of solid waste at an unauthorized facility; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Jaime Garza, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550- 5247, (956) 425-6010.

(9) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2002-0127- AIR-E; IDENTIFIER: Air Account Number BL-0758-C; LOCATION: Sweeny, Brazoria County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §101.6(a) and THSC, §382.085(b), by failing to report an upset and prevent a release of propylene; PENALTY: $13,125; ENFORCEMENT COORDINATOR: Kevin Keyser, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Containment Solutions, Inc.; DOCKET NUMBER: 2002-0303-AIR-E; IDENTIFIER: Air Account Number MQ-0014-M; LOCATION: Conroe, Montgomery County, Texas; TYPE OF FACILITY: fiberglass manufacturing; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; and 30 TAC §122.145(2)(B) and THSC,

§382.085(b), by failing to submit a deviation report; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Dade Aviation, Inc.; DOCKET NUMBER: 2002-0114-PST-E; IDENTIFIER: PST Facility Identification Number 0012357; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: aircraft refueling; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate financial responsibility; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475, by failing to reconcile inventory control records; 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; and 30 TAC §334.10(b)(1)(B), by failing to maintain copies of all required records pertaining to USTs in a secure location; PENALTY: $6,875; ENFORCEMENT COORDINATOR: Kevin Smith, (915) 834-4949; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(12) COMPANY: Duininck Brothers, Inc.; DOCKET NUMBER: 2002-0233-AIR-E; IDENTIFIER: Air Account Number 91-6878-P; LOCATION: Oklaunion, Wilbarger County, Texas; TYPE OF FACILITY: portable asphalt batch plant; RULE VIOLATED: 30 TAC §101.20, 40 Code of Federal Regulation (CFR) §60.92(1), and THSC, §382.085(b), by failing to comply with the 0.04 grain/dry standard cubic foot of particulate matter; and 30 TAC §116.115(b)(2)(G) and (c), Air Permit Number 16878-N, and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limit of 16.61 pounds per hour; PENALTY: $600; ENFORCEMENT COORDINATOR: Carolyn Easley, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas; 79602-7833, (915) 698-9674.

(13) COMPANY: Dynegy Midstream Services, L.P.; DOCKET NUMBER: 2001-1331-AIR-E; IDENTIFIER: Air Account Numbers WN-0005-E, WN-0109-O, WN-0183-C, and DF-0008-K; LOCATION: Chico, Wise County, Texas; TYPE OF FACILITY: gas processing; RULE VIOLATED: 30 TAC §122.146(1) and (2), and THSC, §382.085(b), by failing to submit annual compliance certification; 30 TAC §101.6(b) and THSC, §382.085(a) and (b), by failing to report upset conditions accurately; and 30 TAC §122.145(2) and THSC, §382.085(b), by failing to submit a deviation report; PENALTY: $27,920; ENFORCEMENT COORDINATOR: Judy Fox, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(14) COMPANY: E. I. Du Pont De Nemours and Company; DOCKET NUMBER: 2002-0247- AIR-E; IDENTIFIER: Air Account Number VC-0008-Q; LOCATION: Victoria, Victoria County, Texas; TYPE OF FACILITY: synthetic organic chemical plant; RULE VIOLATED: THSC, §382.085(b), by failing to obtain regulatory authority; 30 TAC §101.6(a) and THSC, §382.085(b), by failing to submit an upset notification for a reportable upset; 30 TAC §101.20(2), 40 CFR §61.357(d)(6) and §63.697(a)(a), and THSC, §382.085(b), by failing to identify the 3DA Unit in the 40 CFR Part 61, Subpart FF quarterly inspection certifications and submit a complete 40 CFR Part 63, Subpart DD notification of compliance status; and 30 TAC §116.115(b)(1) and (2), and (c), Air Permit Numbers 810 and 20011, and THSC, §382.085(b), by exceeding the volatile organic compound maximum allowable emission, failing to obtain regulatory authority for emissions from the pilot flume, vent emissions from a dibasic acid wet extractor, stock a spare low-pressure scrubber off-gas compressor, and provide a list of equipment excluded from monitoring requirements; PENALTY: $37,125; ENFORCEMENT COORDINATOR: Miriam Hall, (512) 239-1044; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(15) COMPANY: Gantt Aviation, Inc.; DOCKET NUMBER: 2002-0512-PST-E; IDENTIFIER: PST Facility Identification Number 0014026; LOCATION: Georgetown, Williamson County, Texas; TYPE OF FACILITY: aircraft sales and retail sales of aviation gas; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to ensure the UST registration and self- certification form is fully and accurately completed; and 30 TAC §37.815(a) and (b), by failing to demonstrate financial assurance; PENALTY: $1,200; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-0739; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(16) COMPANY: Glamour Food Mart, Inc. dba Texas Wawa Food Mart; DOCKET NUMBER: 2001-1452-PST-E; IDENTIFIER: PST Facility Identification Number 0028584; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2)(A)(i)(III), and the Code, §26.3475(a) and (c)(1), by failing to monitor the UST system for releases, have each pressurized line tested or monitored for releases, and test line leak detectors for performance and operational reliability; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures; and 30 TAC §334.22(a), by failing to pay outstanding UST annual registration fees; PENALTY: $600; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: HEC Petroleum, Incorporated; DOCKET NUMBER: 2002-0623-AIR-E; IDENTIFIER: Air Account Number CI-0100-F; LOCATION: near Smith Point, Chambers County, Texas; TYPE OF FACILITY: oil and gas production; RULE VIOLATED: 30 TAC §101.360(a) and THSC, §382.085(b), by failing to submit form ECT-3, level of activity certification; PENALTY: $1,500; ENFORCEMENT COORDINATOR: Sheila Smith, (512) 239-1670; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Bryan Jamail; DOCKET NUMBER: 2002-0432-EAQ-E; IDENTIFIER: Edwards Aquifer (EAQ) Protection Program File Number 01081702; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: real property; RULE VIOLATED: 30 TAC §213.4(a), by failing to submit and receive approval of an Edwards Aquifer contributing zone plan; and 30 TAC §213.23(j), by failing to comply with a condition of an Edwards Aquifer contributing zone plan; PENALTY: $5,100; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(19) COMPANY: Ko Won Nam dba KJ Shell; DOCKET NUMBER: 2002-0439-PST-E; IDENTIFIER: PST Facility Identification Number 0051502; LOCATION: McKinney, Collin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to accurately complete and submit the UST registration and self-certification form; PENALTY: $720; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 2301 Grave Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: KMCO, L.P.; DOCKET NUMBER: 2002-0201-IHW-E; IDENTIFIER: Solid Waste Registration Number 31904; LOCATION: Crosby, Harris County, Texas; TYPE OF FACILITY: specialty chemical manufacturing; RULE VIOLATED: 30 TAC §335.2(b), 40 CFR §270.1(c), and the Code, §26.121, by failing to dispose of hazardous waste at an authorized facility; PENALTY: $30,000; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767- 3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: KMM Interests, Inc. dba Boerne Superstore Ltd.; DOCKET NUMBER: 2002- 0112-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1300037; LOCATION: Boerne, Kendall County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(f) and (3)(A), and THSC, §341.033(d), by failing to take routine monthly bacteriological samples, collect and submit the proper number of additional routine bacteriological samples, by exceeding the maximum contaminant level for total coliform, and failing to collect and submit repeat bacteriological samples; PENALTY: $1,200; ENFORCEMENT COORDINATOR: John Schildwachter, (512) 239-2355; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(22) COMPANY: Keith Zar Pools, Inc.; DOCKET NUMBER: 2002-0320-EAQ-E; IDENTIFIER: EAQ Protection Program Project Number 2016.00; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: swimming pool construction; RULE VIOLATED: 30 TAC §213.4(a), by failing to obtain commission approval prior to the construction of workshops, storage buildings, and paved areas on the recharge zone; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(23) COMPANY: City of Krum; DOCKET NUMBER: 2001-1552-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 10729-001; LOCATION: Krum, Denton County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), (4), (5), (9)(A), and (11)(B), §319.11, TPDES Permit Number 10729- 001, and the Code, §26.121, by failing to prevent unauthorized discharges, maintain records of minimum quality assurance/quality control requirements, maintain the collection system to prevent inflow/infiltration, comply with the permitted daily average flow limit and five-day biochemical oxygen demand (BOD5) permit limits, and report an unauthorized discharge within 24 hours of becoming aware of the discharge; PENALTY: $12,500; ENFORCEMENT COORDINATOR: Wendy Cooper, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Road, Fort Worth, Texas 76118-6951, (817) 588-5800.

(24) COMPANY: Patsy Tobias dba Kwik Stop; DOCKET NUMBER: 2002-0509-PST-E; IDENTIFIER: PST Facility Identification Number 0048402; LOCATION: Marlin, Falls County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to ensure that the UST registration and self-certification form was fully and accurately complete and make available to a common carrier a valid, current delivery certificate; and 30 TAC §37.815(a) and (b), by failing to demonstrate the required financial assurance.; PENALTY: $2,000; ENFORCEMENT COORDINATOR: John Schildwachter, (512) 239-2355; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(25) COMPANY: L.F. Manufacturing, Incorporated; DOCKET NUMBER: 2001-1573-MLM-E; IDENTIFIER: Air Account Number LF-0053-U and Solid Waste Registration Number 84034; LOCATION: Giddings, Lee County, Texas; TYPE OF FACILITY: fiberglass tank and pipe manufacturing; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b), by failing to obtain a permit before constructing the thermoset resin cutting and grinding operations; 30 TAC §116.115(b)(2)(F)(i) and (G), Permit Numbers 25301 and 25401, and THSC, §382.085(b), by failing to maintain records containing the information and data sufficient to demonstrate compliance and by emitting air contaminants at levels in excess of the values; 30 TAC §335.2(b), by disposing of hazardous waste at an unauthorized facility; 30 TAC §335.6(c), by failing to report any change regarding the storage, processing, or disposal of hazardous or class 1 industrial waste; 30 TAC §335.9(a)(2), by failing to submit an annual waste summary; 30 TAC §335.112(a)(1) and (3), and 40 CFR §265.51(a), by failing to develop a contingency plan and provide facility personnel with a program of classroom instruction or on-the-job training; 30 TAC §335.69(a)(1)(A) and (d)(2), and 40 CFR §26.34(c)(ii) and §265.173(a), by having hazardous waste containers of waste acetone in the satellite accumulation areas with open bungs and hazardous waste containers of waste acetone were not labeled as hazardous waste; 30 TAC §335.92, by transporting hazardous waste without first obtaining an identification number; 30 TAC §335.24(g), by failing to meet the notification, recordkeeping, and reporting requirements of 30 TAC §§335.4, 335.7, and 335.9 - 335.15; 30 TAC §335.474 and THSC, §361.505, by failing to prepare a five-year source reduction and waste minimization plan; 30 TAC §122.146(1) and THSC, §382.085(b), by failing to certify compliance with the terms and conditions of federal operating permit number O- 01825; 30 TAC §122.145(2)(A), by failing to report all instances of deviations; and 30 TAC §101.27(a), by failing to pay air emission fees; PENALTY: $55,750; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(26) COMPANY: George Foley, Sr. dba Lakeline Acres Water Supply; DOCKET NUMBER: 2001-1438-PWS-E; IDENTIFIER: PWS Number 0180025; LOCATION: Clifton, Bosque County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(A), (m), and (n)(2), and §290.110(b)(4), by failing to maintain the residual disinfectant concentration, initiate a maintenance program, and maintain and make available an accurate and up-to-date map of the distribution system; 30 TAC §290.41(c)(3)(B) and (K), by failing to provide a well casing 18 inches above the ground surface and seal the wellhead with the use of gaskets or a pliable crack-resistant caulking compound; and 30 TAC §290.43(c)(2), by failing to maintain the roof hatches; PENALTY: $500; ENFORCEMENT COORDINATOR: James Jackson, (254) 751-0335; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(27) COMPANY: Mauritz and Couey Transportation, L.L.C. and Mauritz and Couey Transportation, L.L.C. dba Weaver's #2; DOCKET NUMBER: 2002-0161-PST-E; IDENTIFIER: PST Facility Identification Number 0027212; LOCATION: Port Lavaca, Calhoun County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a) and §26.3467(a), by failing to obtain a valid, current delivery certificate and make available to a common carrier a valid, current delivery certificate; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Edward Moderow, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(28) COMPANY: City of Menard; DOCKET NUMBER: 2002-0340-MWD-E; IDENTIFIER: TPDES Permit Number 10345-001; LOCATION: Menard, Menard County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5), TPDES Permit Number 10345-001, and the Code, §26.121(c), by failing to meet the daily average permit limit for fecal coliform; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(29) COMPANY: North Star Steel Texas, Inc.; DOCKET NUMBER: 2002-0395-IWD-E; IDENTIFIER: TPDES Permit Number 01971; LOCATION: Beaumont, Orange County, Texas; TYPE OF FACILITY: steel mill; RULE VIOLATED: 30 TAC §305.125(1) and (11)(A), TPDES Permit Number 01971, and the Code, §26.121, by failing to comply with the permitted limits for total zinc, oil and grease, total suspended solids (TSS), total chlorine residual, and total copper and to collect the required samples for fecal coliform, TSS, and BOD; PENALTY: $11,000; ENFORCEMENT COORDINATOR: Michelle Harris, (512) 239-0492; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(30) COMPANY: North Texas Municipal Water District dba McKinney Landfill and Maxwell Creek Landfill; DOCKET NUMBER: 2001-1396-MSW-E; IDENTIFIER: Municipal Solid Waste (MSW) Permit Numbers 568A and 44A; LOCATION: McKinney and Sachse, Collin County, Texas; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §330.4(b) and MSW Permit Number 568A, by failing to prevent the storage and disposal of class one shredded wire waste; 30 TAC §330.5(a)(1) and §330.117(b), and the Code, §26.121(a), by failing to ensure that small piles of MSW from truck cleanouts were disposed of in an authorized site and prevent the discharge of contaminated storm water from a disconnected pipe; 30 TAC §330.133(a) and (f), by failing to completely cover exposed waste from the previous day's operation with six inches daily cover material and repair intermediate cover on cell one and two large erosion ruts; 30 TAC §330.116 and §330.122, by failing to maintain grid marker number 23 so it could be easily read and maintain a natural gas pipeline easement marker with green paint; 30 TAC §330.119, by failing to conspicuously display the site sign at the entrance to the landfill; 30 TAC §330.5(a)(1), MSW Permit Number 568A, and the Code, §26.121, by failing to prevent the discharge of contaminated water and leachate from intermediate cover seeps; 30 TAC §330.11 and MSW Permit Number 578A, by failing to ensure that all permanent monitoring probes and soil gas vapor probes were properly labeled and have eight permanently installed boundary soil gas vapor probes; 30 TAC §330.56(n)(2), (7)(C), and (8)(A), §330.111, and MSW Permit Number 44A, by failing to adhere to the approved routine methane monitoring program, modify the landfill gas management plan to include a backup plan to replace the proposed passive vent system, and install a permanent monitoring system; 30 TAC §30.5(e)(6)(A) and §330.6(e)(6)(A), by failing to prevent discarded drilling mud, composed of bentonite, water, and clay soil, from being disposed of at the landfill; and MSW Permit Number 44A, by failing to maintain fire protection; PENALTY: $34,000; ENFORCEMENT COORDINATOR: John Mead, (512) 239-6010; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(31) COMPANY: ONEOK Texas Field Services, L.P.; DOCKET NUMBER: 2002-0590-AIR-E; IDENTIFIER: Air Account Number HW-0068-A; LOCATION: Fritch, Hutchinson County, Texas; TYPE OF FACILITY: gas compression station; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit one annual compliance certification report; and 30 TAC §106.512(20(C)(iii) and THSC, §382.085(b), by failing to perform biennial sampling of oxides of nitrogen and carbon monoxide; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(32) COMPANY: Petro-Chemical Transport, Inc.; DOCKET NUMBER: 2002-0393-PST-E; IDENTIFIER: Enforcement Identification Number 17522; LOCATION: Weatherford, Parker County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $3,600; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(33) COMPANY: Radiance Water Supply Corporation; DOCKET NUMBER: 2001-1474-PWS- E; IDENTIFIER: PWS Number 1050075 and Certificate of Convenience and Necessity Number 12413; LOCATION: Austin, Hays County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.111(a), by failing to provide proper treatment of groundwater; and THSC, §341.0315(c), by failing to supply customers with public drinking water that is free from deleterious matter and which complies with the standards established by the commission; PENALTY: $600; ENFORCEMENT COORDINATOR: Michelle Harris, (512) 239-0492; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(34) COMPANY: Silkot International, Inc. dba Speed Trak 2; DOCKET NUMBER: 2001-1067- PST-E; IDENTIFIER: PST Facility Identification Number 211; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: retail gasoline service station; RULE VIOLATED: 30 TAC §334.8(c)(4)(8) and the Code, §26.346(a), by failing to ensure that the UST registration and self-certification form is fully and accurately completed; and 30 TAC §37.815(a) and (b), by failing to demonstrate the required financial responsibility; PENALTY: $8,250; ENFORCEMENT COORDINATOR: Elnora Moses, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(35) COMPANY: Southeast Texas Industries, Inc.; DOCKET NUMBER: 2002-0251-ISW-E; IDENTIFIER: Industrial Solid Waste Number 39836; LOCATION: Bridge City, Orange County, Texas; TYPE OF FACILITY: metal fabrication; RULE VIOLATED: 30 TAC §324.4(2)(C)(ii), by failing to use a commission registered used oil transporter to transport used oil for disposal; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(36) COMPANY: Synergistic Environmental Systems, Inc.; DOCKET NUMBER: 2001-1232- IHW-E; IDENTIFIER: Solid Waste Registration Number 78144; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: environmental services company; RULE VIOLATED: 30 TAC §335.2(a) and §335.91(d), by failing to obtain a permit for the storage of hazardous waste; 30 TAC §335.4 and the Code, §26.121, by failing to prevent discharges of industrial and hazardous waste; 30 TAC §335.6(c), by failing to notify the commission of all solid waste streams and waste management units; 30 TAC §335.9(a)(1) and (2), by failing to keep records regarding waste processing, quantities generated and the description of each waste and provide complete and accurate annual waste summaries; 30 TAC §335.11(a)(1) and (c)(1), by receiving shipments of industrial class one waste without a manifest and allowing a shipment of wastes without dating the manifests; 30 TAC §335.62, by failing to perform hazardous waste determinations; 30 TAC §335.69(d), (e), and (f)(4), and 40 CFR §262.34(a)(3) and (c)(2), by failing to label 15 containers of hazardous waste in a satellite accumulation area, one container of hazardous waste in the container storage area, comply with satellite accumulation quantity limits, have a preparedness and prevention plan for the facility, and make arrangements to familiarize local authorities with emergency related procedures; 30 TAC §335.474, §335.479, and THSC, §361.505, by failing to prepare a source reduction and waste minimization plan; and 30 TAC §312.9, by failing to pay the annual fee for a transporter of waste management sludge; PENALTY: $600; ENFORCEMENT COORDINATOR: Sushil Modak, (512) 239-2142; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(37) COMPANY: William Smith dba Tallows Mobile Home Park; DOCKET NUMBER: 2002- 0570-PWS-E; IDENTIFIER: Public Water Supply Number 1010063; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.117(b)(2) and (c), by failing to submit a sample site selection form and conduct initial lead and copper monitoring; PENALTY: $625; ENFORCEMENT COORDINATOR: Shawn Stewart, (512) 239-6684; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(38) COMPANY: Tandem Energy Corporation; DOCKET NUMBER: 2002-0477-AIR-E; IDENTIFIER: Air Account Number HG-0230-U; LOCATION: Tomball, Harris County, Texas; TYPE OF FACILITY: gas compressor station; RULE VIOLATED: 30 TAC §122.504(a)(4)(A) and THSC, §382.085(b), by failing to submit an application; PENALTY: $2,000; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(39) COMPANY: Tiendas Conveniente Inc. dba In 'N' Out Convenience Store; DOCKET NUMBER: 2002-0243-PST-E; IDENTIFIER: PST Facility Identification Number 0048761; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(1)(C) and (2), and THSC, §382.085(b), by failing to successfully perform the annual A/L test and successfully perform the annual pressure decay test; and 30 TAC §115.246(3), (4), and (6), and THSC, §382.085(b), by failing to maintain a record of any maintenance conducted at the station, provide documentation and certification for the Stage II facility representative, and document and maintain a record of daily inspections; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239- 0739; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(40) COMPANY: United Petroleum Transports, Inc.; DOCKET NUMBER: 2002-0093-PST-E; IDENTIFIER: Enforcement Identification Number 16963; LOCATION: Abilene, Taylor County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $800; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(41) COMPANY: United Petroleum Transports, Inc.; DOCKET NUMBER: 2002-0423-PST-E; IDENTIFIER: Enforcement Identification Number 17540; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §334.5(b)(1)(A), by failing to ensure that the owner or operator had a valid, current delivery certificate; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(42) COMPANY: Curtis Neyland, Jr. dba Wallace Tire & Battery; DOCKET NUMBER: 2002- 0643-PST-E; IDENTIFIER: PST Facility Identification Number 71339; LOCATION: Centerville, Leon County, Texas; TYPE OF FACILITY: tire and battery shop; RULE VIOLATED: 30 TAC §334.48(c), by failing to implement complete and adequate inventory controls; 30 TAC §334.8(c)(4)(B) and (5)(A)(i), and the Code, §26.346(a), by failing to submit an accurately completed registration and self-certification form and make available to a common carrier a valid, current delivery certificate; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(43) COMPANY: Kirby G. Black dba Western Hills Mini Mart; DOCKET NUMBER: 2002- 0275-PST-E; IDENTIFIER: PST Facility Identification Number 0053898; LOCATION: Nacogdoches, Nacogdoches County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(B), (5)(A)(i), and (C), and the Code, §26.346(a) and §26.3467(a), by failing to submit an accurately completed registration and self-certification form, make available to a common carrier a valid, current delivery certificate, and physically label any of the tank fill pipes; 30 TAC §334.49(c)(2)(C) and the Code, §26.3475(d), by failing to conduct regular inspections of an impressed current cathodic protection system; PENALTY: $600; ENFORCEMENT COORDINATOR: John Barry, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

TRD-200204775
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: July 30, 2002

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Notice of Postponement of Public Meeting Regarding Stoller Chemical Company Site

The Texas Natural Resource Conservation Commission is issuing this public notice of a postponement of the August 15, 2002 public meeting to receive comment on the proposed deletion of the Stoller Chemical Company site from the state Superfund Registry and the determination to take no further action. As a result of removal actions that have been performed at the site, the TNRCC determined that the Stoller Chemical Company State Superfund site, located at 5200 North Columbia Street, Plainview, Hale County, Texas, no longer presents an imminent and substantial endangerment to public health and safety and the environment, and is eligible for deletion.

Due to a failure to provide proper local public notification, the public meeting, scheduled for 7:00 p.m. on August 15, 2002, in the council chambers of Plainview City Hall, has been cancelled. This public meeting will be re-scheduled and announced in the near future.

For further information regarding this cancellation or the site, please call Mr. Bruce McAnally, TNRCC Community Relations, at 1-800-633-9363.

TRD-200204909
Paul C. Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: July 31, 2002

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Notice of Water Quality Applications.

The following notices were issued during the period of July 12 ,2002 through July 29, 2002.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE.

CITY OF AUSTIN - WILD HORSE RANCH has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 10543-013, to authorize the discharge of treated

domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located approximately 4,800 feet east of the intersection of Blue Bluff Road and Lindel Lane and approximately 7,200 feet north of the intersection of Bloor Road and Farm-to-Market Road 973 in Austin, in Travis County, Texas. The treated effluent is discharged via pipe to an unnamed tributary of Gilleland Creek; thence to Gilleland Creek; thence to the Colorado River Downstream of Town Lake in Segment No. 1428 of the Colorado River Basin.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO.50 has applied for a renewal of TPDES Permit No. 13228-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility is located at 22122 Bellaire Boulevard, approximately 4,600 feet southeast of the intersection of Farm-to-Market Road 1093 and Grand Parkway in Fort Bend County, Texas.

CITY OF HOUSTON has applied for renewal of an existing wastewater permit. The applicant has a National Pollutant Discharge Elimination System (NPDES) Permit No. TX0034924 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 10495-003. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 28,000,000 gallons per day. The plant site is located approximately 2,000 feet east of State Highway 288 at 12319 and 1/2 Almeda Road in the southwest quadrant of the City of Houston in Harris County, Texas.

CITY OF HOUSTON, DEPARTMENT OF PUBLIC WORKS AND ENGINEERING has applied for a renewal of TNRCC Permit No. 10495-116, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 18,000,000 gallons per day. The facility is located on the northeast corner of the intersection of Old Westheimer Road and Alief- Clodine Road in the City of Houston in Harris County, Texas.

CITY OF JACINTO CITY has applied for a renewal of TNRCC Permit No. 10195-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 1,640,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,640,000 gallons per day. The plant site is located just southeast of the Market Street Bridge over Hunting Bayou in Jacinto City in Harris County, Texas.

CITY OF KATY has applied for a renewal of TNRCC Permit No. 10706-001 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,450,000 gallons per day. The plant site is located at 25839 Interstate Highway 10 on the east bank of Caney Island Branch of Buffalo Bayou, approximately 1,000 feet south of Interstate Highway 10 in the City of Katy in Fort Bend County, Texas.

CITY OF LAREDO has applied for renewal of an existing wastewater permit. The applicant has an existing National Pollutant Discharge Elimination System (NPDES) Permit No. TX0002542 and an existing Texas Natural Resource Conservation Commission (TNRCC) Permit No. 10681-001. The draft permit authorizes the discharge of water treatment plant wastewater at a daily average flow not to exceed 4,100,000 gallons per day. The plant site is located at 2519 Jefferson Street, adjacent to the Rio Grande in the City of Laredo in Webb County, Texas.

NORTH ALAMO WATER SUPPLY CORPORATION has applied for a major amendment to Permit No. 13747-002, to authorize an increase in the daily average flow from 124,000 gallons per day to 210,000 gallons per day; to increase the acreage irrigated from 33.16 acres to 56 acres. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 124,000 gallons per day via surface irrigation of 33.16 acres of land seeded primarily with bermuda grass. This permit will not authorize a discharge of pollutants into waters in the State. The facility and disposal site are located approximately 0.9 mile north of State Highway 107 and 0.5 mile west of Farm-to-Market Road 1423, north of the community of San Carlos in Hidalgo County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. 10262-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,200,000 gallons per day. The facility is located approximately 1.2 miles south-southwest of the intersection of State Highway 205 Farm-to-Market Road 552 in Rockwall County, Texas.

TRINITY PINES CONFERENCE CENTER, INC. has applied for a renewal of TPDES Permit No. 12371-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility is located approximately 1,500 feet west of Lake Livingston, and approximately 1,400 feet north of Farm-to-Market Road 356 in Trinity County, Texas.

CITY OF WEST TAWAKONI has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 14344-001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located near the west shore of Lake Tawakoni approximately 1.5 miles south of Farm-to-Market Road 35 and 7 miles east of the City of Quinlan in Hunt County, Texas.

Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 10 DAYS OF THE ISSUED DATE OF THIS NOTICE

The Texas Natural Resource Conservation Commission (TNRCC) has initiated a minor modification of the Texas Pollutant Discharge Elimination System (TPDES) permit issued to DONNA INDEPENDENT SCHOOL DISTRICT to authorize the inclusion of a provision for routing wastewater generated from the kitchen to a grease trap. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 17,000 gallons per day. The facility is located approximately 1,000 feet west of the intersection of State Highway 493 and U.S. Highway 281, 3.6 miles south of the City of Donna in Hidalgo County, Texas.

TRD-200204940
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: July 31, 2002

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Public Utility Commission of Texas

Change in Date for Public Hearing in Rulemaking Proceeding to Address Notification Issues Arising from Changes in Preferred Telecommunications Utilities

The Public Utility Commission of Texas (commission) will hold a Public Hearing on Thursday, August 22, 2002 at 9:30 a.m. in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 regarding new rules clarifying the carrier records exchange process when a customer changes its preferred local, long-distance or toll provider. Project Number 26131, *PUC Rulemaking Proceeding to Address Notification Issues Arising from Changes in Preferred Telecommunications Utilities* has been established for this proceeding. The Public Hearing, originally scheduled to convene on Friday, August 23, 2002 at 9:30 a.m. in Hearing Room Gee, has been rescheduled in order not to conflict with the

Commission's August 23, 2002 Open Meeting (originally scheduled for August 22, 2002).

Questions concerning the Public Hearing or this notice should be referred to Rosemary McMahill, Senior Policy Analyst, Policy Development Division, (512) 936-7244. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204768
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 29, 2002

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Notice of Amendment to Interconnection Agreement

On July 22, 2002, Southwestern Bell Telephone, LP d/b/a Southwestern Bell Telephone Company and Buy-Tel Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2002) (PURA). The joint application has been designated Docket Number 26317. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) 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 13 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 26317. 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 August 22, 2002, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to the commission's 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 action, 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, or by phone 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 26317.

TRD-200204555
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 24, 2002

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Notice of Amendment to Interconnection Agreement

On July 22, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and Ciera Network Systems, Inc.., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2002) (PURA). The joint application has been designated Docket Number 26318. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) 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 13 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 26318. 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 August 22, 2002, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule

§22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, 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, or by phone 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 26318.

TRD-200204554
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 24, 2002

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Notice of Amendment to Interconnection Agreement

On July 22, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and Netspan Corporation doing business as Foremost Telecommunications, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2002) (PURA). The joint application has been designated Docket Number 26325. 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 13 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 26325. 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 August 22, 2002, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to the commission's 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 action, 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, or by phone 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 26325.

TRD-200204557
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 24, 2002

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Notice of Amendment to Interconnection Agreement

On July 29, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and Fort Bend Long Distance doing business as Fort Bend Communications, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2002) (PURA). The joint application has been designated Docket Number 26370. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) 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 13 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 26370. 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 August 27, 2002, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to the commission's 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 action, 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, or by phone 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 26370.

TRD-200204845
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2002

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Notice of Amendment to Interconnection Agreement

On July 29, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and TXU Communications Telecom Services Company, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2002) (PURA). The joint application has been designated Docket Number 26371. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) 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 13 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 26371. 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 August 27, 2002, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, 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, or by phone 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 26371.

TRD-200204844
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2002

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Notice of Application for a Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 24, 2002, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of SmartEnergy, Inc., doing business as SE Energy Company for Retail Electric Provider (REP) certification, Docket Number 26333 before the Public Utility Commission of Texas.

Applicant's requested service area by geography or/service area by customers includes the geographic area of the Electric Reliability Council of Texas (ERCOT).

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512)936-7120 no later than August 16, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200204670
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26, 2002

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On July 25, 2002, e*spire filed an application with the Public Utility Commission of Texas (PUC) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60105. Applicant intends to reflect a change in ownership/control to Xspedius Management Co. Switched Services, LLC.

The Application: Application of e*spire for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 26108.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than August 14, 2002. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 26108.

TRD-200204733
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: (512) 936-7308

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 22, 2002, for a service provider certificate of operating authority (SPCOA), pursuant to § §54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Advance Telephone Services for a Service Provider Certificate of Operating Authority, Docket Number 26314 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, Long Distance, and wireless services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone Company and Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-800-782-8477 no later than August 14, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 26314.

TRD-200204578
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 25, 2002

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 24, 2002, for a service provider certificate of operating authority (SPCOA), pursuant to § §54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Connect Paging, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 26334 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service.

Applicant's requested SPCOA geographic area includes the area comprising the Dallas/Fort Worth and San Antonio Local Access and Transport Areas currently served by Verizon Southwest and Southwestern Bell Telephone Company.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-800-782-8477 no later than August 14, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket No. 26334.

TRD-200204671
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 26, 2002

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on July 25, 2002, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Home Communications of America, Inc., d/b/a Rabbit Communications for a Service Provider Certificate of Operating Authority, Docket Number 26337 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, VDSL, T1-Private Line, and long distance services.

Applicant's requested SPCOA geographic area includes the area comprising the Dallas/Fort Worth Local Access and Transport Area currently served by Verizon Southwest and Southwestern Bell Telephone Company.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-800-782-8477 no later than August 14, 2002. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 26337.

TRD-200204767
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 29, 2002

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Notice of Application for Waiver to Requirements in Public Utility Commission of Texas Substantive Rule §25.181

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on July 24, 2002, for waiver of the limitation on energy efficiency incentive payments imposed by the commission's Substantive Rule §25.181(h)(3).

Docket Title and Number: Application of CenterPoint Energy Houston Electric (CenterPoint) to Amend Its Air Conditioner Distributor Market Transformation Program for Waiver of the Limitation of Incentive Payments Imposed by the commission's Substantive Rule §25.181(h)(3). Docket Number 26336.

The Application. The commission's 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 or market transformation program. The rule permits a utility to petition the commission for a 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. Currently, according to the Applicant, contracts with air conditioner distributors are expected to produce no more than 60% of the Air Conditioner Distributor Market Transformation Program (the Program) goal of 15,750 tons. The 40% shortfall in the Program represents a shortfall of 17% in CenterPoint's January 1, 2003 energy efficiency goal. In order to accomplish this goal, the Applicant seeks to amend the applicable text in its Program to remove the 20% limitation on the incentives any one sponsor may receive.

On or before August 19, 2002, persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 26336.

TRD-200204772
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 29, 2002

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Notice of Contract Award

The Public Utility Commission of Texas announces that it has entered into a major consulting contract with L.R. Christen Associates, Inc. (LRCA), with its offices at 4610 University Avenue, Suite 700, Madison, Wisconsin 53705-2164. This notice is being published pursuant to the provisions of the Texas Government Code Annotated §2254.030. The purpose of the contract is to conduct market monitoring activities, including load participation and price responsiveness in the Electric Reliability Council of Texas (ERCOT), pursuant to Chapter 39 of the Public Utility Regulatory Act, Title II of the Texas Utilities Code. The total amount of the contract will not exceed $19,000. The contract term is from May 23, 2002 to August 31, 2002.

TRD-200204766
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 29, 2002

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Notice of Interconnection Agreement

On July 22, 2002, Southwestern Bell Telephone, LP doing business as Southwestern Bell Telephone Company and Phone-Link, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supp. 2002) (PURA). The joint application has been designated Docket Number 26324. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) 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 13 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 26324. 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 August 22, 2002, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to the commission's 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 action, 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, or by phone 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 26324.

TRD-200204556
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 24, 2002

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Notice of Interconnection Agreement

On July 23, 2002, State Discount Telephone, LLC, Texas Alltel, Inc., and Sugar Land Telephone Company, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2002) (PURA). The joint application has been designated Docket Number 26327. The joint application and the underlying interconnection agreement are available for public inspection at the Public Utility Commission of Texas (commission) 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 13 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 26327. 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 August 23, 2002, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to the commission's 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 action, 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, or by phone 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 26327.

TRD-200204576
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 25, 2002

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Public Notice of Intent to File Pursuant to the Public Utility Commission of Texas Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a long run incremental cost (LRIC) study pursuant to the Public Utility Commission of Texas (commission). Substantive Rule §26.214

Docket Title and Number. Central Telephone Company of Texas Application for Approval of LRIC Study to introduce Special Access High Capacity Service DS3, 44.736 Mbps, and introduce Sealing Current Conditioning and Customer Specified Premises Receive Level as two new Special Access Voice Grade Service Optional Features and Functions, Pursuant to the commission's Substantive Rule §26.214 on or after August 2, 2002, Docket Number 26328.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26328. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204553
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 24, 2002

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214.

Docket Title and Number. United Telephone Company of Texas, Inc. Application for Approval of LRIC Study for New Optional Features and Premium Packages to ISDN-PRI Pursuant to P.U.C. Substantive Rule §26.214 on or after August 5, 2002, Docket Number 26347.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26347. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204732
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 29, 2002

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Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas, a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214.

Docket Title and Number. Central Telephone Company of Texas Application for Approval of LRIC Study for New Optional Features and Premium Packages to ISDN-PRI Pursuant to P.U.C. Substantive Rule §26.214 on or after August 5, 2002, Docket Number 26348.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26348. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204731
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 29, 2002

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Public Notice of Intent to File Pursuant to Public Utility Commission of Texas Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission), a long run incremental cost (LRIC) study pursuant to the commission's Substantive Rule §26.214

Docket Title and Number. United Telephone Company of Texas, Inc. Application for Approval of LRIC Study to Introduce Digital Trunking Service (DTS) as a New Offering Pursuant to the commission's Substantive Rule §26.214 on or after August 8, 2002, Docket Number 26363.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26363. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204840
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2002

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Public Notice of Intent to File Pursuant to Public Utility Commission of Texas Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) a long run incremental cost (LRIC) study pursuant to the commission's Substantive Rule §26.214

Docket Title and Number. United Telephone Company of Texas, Inc. Application for Approval of LRIC Study to Introduce ESP Link℠ as a New Offering Pursuant to the commission's Substantive Rule 26.214 on or after August 8, 2002, Docket Number 26364.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26364. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204841
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2002

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Public Notice of Intent to File Pursuant to the Public Utility Commission of Texas Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission), a long run incremental cost (LRIC) study pursuant to the commission's Substantive Rule §26.214

Docket Title and Number. Central Telephone Company of Texas Application for Approval of LRIC Study to Introduce Digital Trunking Service (DTS) as a New Offering Pursuant to the commission's Substantive Rule §26.214 on or after August 8, 2002, Docket Number 26365.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 26365. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204842
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2002

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Public Notice of Intent to File Pursuant to Public Utility Commission of Texas Substantive Rule §26.214

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission), a long run incremental cost (LRIC) study pursuant to the commission's Substantive Rule §26.214

Docket Title and Number. Central Telephone Company of Texas Application for Approval of LRIC Study to Introduce ESP Link℠ as a New Offering Pursuant to the commission's Substantive Rule §26.214 on or after August 8, 2002, Docket Number 26366.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket No. 26366. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204843
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2002

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Public Notice of Workshop on Competitive Metering

The Public Utility Commission of Texas (commission) will hold a workshop regarding competitive metering and the implementation of Public Utility Regulatory Act §39.107, on Tuesday, September 10, 2002, at 9:00 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 26359, *Rulemaking to Address Competitive Metering* has been established for this proceeding.

Ten days prior to the workshop the commission shall make available in Central Records under Project Number 26359 an agenda for the format of the workshop, including discussion topics. The format will allow for panel discussions and/or presentations by interested parties. The commission requests that persons interested in making a presentation at the workshop or appearing on a panel register by phone with Melissa Silguero, Policy Development Division, at (512) 936-7213, no later than August 19, 2002.

Questions concerning the workshop or this notice should be referred to Connie Corona, Director, Electric Policy Analysis, Policy Development Division at (512) 936-7212. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200204776
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: July 30, 2002

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Office of Rural Community Affairs

Medically Underserved Community-State Matching Incentive Program Request for Proposal

Request for Proposals ("RFP")

Medically Underserved Community-State Matching Incentive Program

The Office of Rural Community Affairs (ORCA) is issuing a Request for Proposals ("RFP") for the Medically Underserved Community-State Matching Incentive Program. The purpose of this RFP is to provide the applicant with the information necessary to apply for matching state grant funds under the provisions of this program.

The purpose of this program is to increase the number of physicians providing primary care in medically underserved communities, particularly rural.

USE OF FUNDS: The funds can be used to establish a medical office and ancillary facilities for diagnosing and treating patients. The optimum use of funds would be for the purchase of equipment and furnishings that would establish a new practice site. The site will continue to serve the primary care needs of the community beyond the grant period, and the physician will agree to practice for a minimum of two years.

AMOUNT OF AWARDS: The funding available for support of this program during FY 2003 is $250,000. Approximately 10 projects will be funded. Under the requirements of this program the state grants funds of up to $25,000 to match the contributions by community groups to cover start-up costs for new physicians.

ELIGIBLE APPLICANTS: An eligible community must be in an underserved area as determined by the U.S. Department of Health and Human Services or the Texas Department of Health. The community must make a commitment of $15,000 - $25,000 in contributions toward the project and contract with a physician eligible to participate in this program.

Eligible physicians include those in family/general practice, general pediatrics, general internal medicine, or general obstetrics/gynecology. The physician must be licensed to practice in the State of Texas, have completed an accredited residency program, and have contracted with the community to provide full-time primary care for at least two years. A physician who completed residency within the last ten years will be given priority consideration.

EVALUATION AND SELECTION: ORCA will prioritize the eligible communities to assure that the neediest are provided grants. The prioritization process will quantify indicators of need that may include, but are not limited to, the following: no practicing primary care physicians; only one primary care physician and a population of at least 2,000; no federally or state-funded primary care clinic; no practicing physician assistants or nurse practitioners; the participating physician will be the only physician practicing in one of the primary care specialties; a large minority population, if the participating physician is a member of the same minority group; designation by the United States Department of Health and Human Services as a primary care Health Professional Shortage Area (HPSA) for at least the last five years; a population-to-primary care provider ratio in the top 25% of all counties in the state; poverty rates above the state average; and median family incomes at least 25% below the state average.

DEADLINE: Applications are available September 1, 2002. Completed applications are due by May 31, 2003. Announcement of the selected applicants will be made by June 30, 2003.

CONTRACT PERIOD: The budget period for applications funded under this RFP will be September 1, 2003 - August 31, 2004.

CONTACT PERSON: To obtain the application, please contact:

David Darnell, Program Administrator,

Office of Rural Community Affairs,

P.O. Box 12877,

Austin, Texas 78711,

(512) 936-6701,

email: ddarnell@orca.state.tx.us.

TRD-200204738

Robt. J. "Sam" Tessen, MS
Executive Director
Office of Rural Community Affairs
Filed: July 29, 2002

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Texas State Soil and Water Conservation Board

Notice of Public Hearings

The Texas State Soil and Water Conservation Board will conduct public hearings on the following dates at the following locations: August 15, 2002 at 9:00 a.m. in Big Spring at the Big Spring Chamber of Commerce, 215 West 3rd in the meeting room; August 15, 2002 at 1:00 p.m. in Victoria at the Pattie Dodson Health Center, 2805 North Navarro; August 16, 2002 at 9:00 a.m. in Pecos at the Community Center, 508 South Oak Street.

The public hearing is being held under authority of §203.051 and §203.052 of the Agriculture Code of Texas.

The purpose of the hearings will be to receive comments from the public on proposed amendments on 31 TAC Chapter 517, Financial Assistance, Subchapter B, Cost-Share Assistance for Brush Control. The amendments address needed changes to the rules to reflect current brush control program administration.

These hearings are being held at the request of soil and water conservation districts.

Any person may appear and offer comments or statements either verbally or in writing; however, questioning of commenters will be reserved exclusively to the Board or its staff as may be necessary to ensure a complete record. While any person with relative comments or statements will be granted an opportunity to present them during the course of the hearing, the Board reserves the right to restrict statements in terms of time or repetitive content.

Persons with disabilities who plan to attend this hearing and who may need auxiliary aids, services or special accommodations are requested to contact James Moore at (254) 773-2250 at least two working days prior to the hearing.

TRD-200204961
Robert G. Buckley
Executive Director
Texas State Soil and Water Conservation Board
Filed: July 31, 2002

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Request for Proposal for the CWA, Section 319(h)

In compliance with the Clean Water Act of 1987, the United States Environmental Protection Agency (EPA) provides Section 319(h) funding to the State of Texas to implement activities that result in demonstrated progress in achieving Congress' goal of controlling and abating nonpoint source (NPS) pollution. The availability of Section 319(h) grant funding presents Texas an opportunity to implement a NPS management program and address challenges in water quality brought forth by NPS pollution. The Texas State Soil and Water Conservation Board located in Temple, Texas is the lead agency for the State's agricultural and silvicultural nonpoint source management program. EPA's goal is to ensure that the Section 319(h) funds are directed toward effective, high quality NPS projects that will achieve the best possible results in addressing NPS pollution. Demonstrated results in water quality improvement and protection through implementation of agricultural and silvicultural best management practices (BMPs) are vitally important.

National EPA guidance issued for FY03 emphasizes the need for a comprehensive watershed approach and the use of Total Maximum Daily Loads (TMDLs) in high priority watersheds to restore waters impaired or threatened by NPS pollution. TSSWCB is requesting proposals for implementation and demonstration projects within the boundaries of these impaired or threatened watersheds. Projects will be funded through Section 319(h) grants. Grants will be available to public and private entities such as local governments, educational institutions, non-profit organizations, and state agencies. A competitive proposal process will be used so that the most appropriate and effective projects are selected for funding.

The types of NPS activities that can be funded with Section 319(h) grants include implementation projects as well as trainings, demonstrations, technical assistance, and public outreach/education projects aimed to encourage adoption of pollution prevention techniques and practices. Monitoring activities to determine the effectiveness of specific pollution prevention methods are eligible as well, however, Section 319(h) grants cannot support research activities.

Project proposals should stress interagency coordination, demonstrate new or innovative technologies or institutional approaches, use approaches that have statewide applicability, use comprehensive approaches, and stress public participation and technology transfer.

Funds are generally granted for a period not to exceed three (3) years. The non-federal share of the funding must be at least 40% of the total award. Monthly, quarterly, and final project reports are the minimum reporting requirements. Deliverables for general distribution (i.e., videos, news releases, literature) will be submitted to EPA, Region 6 for approval through the TSSWCB.

Submitted proposals will be evaluated, scored, and ranked based on the consistency of the proposal with the guidelines set forth in the *1999 Texas Nonpoint Source Pollution Assessment Report and Management Program* and past performance of the performing entity/entities. A minimum scoring requirement is necessary for proposals to be eligible for consideration.

Proposals selected by the TSSWCB will be assigned to a TSSWCB planner. The planner will work with the applicant to amend and finalize the proposal. Upon TSSWCB approval of the finalized proposal, the planner will serve as the project contact and manager. EPA will review all proposals prior to TSSWCB awarding grant funds.

For a complete copy of the TSSWCB's Proposal Submission Procedures, please visit www.tsswcb.state.tx.us/reports/proposal-guidence.pdf or contact a member of the 319 Program staff (254) 773-2250. Proposals must be postmarked no later than August 20, 2002 to be considered. Address all proposals to: Texas State Soil and Water Conservation Board, P.O. Box 658, Temple, TX 76503, Phone: (254) 773-2250, Fax: (254) 773-3311, Website: www.tsswcb.state.tx.us 2 of 2

TRD-200204727
Robert G. Buckley
Executive Director
Texas State Soil and Water Conservation Board
Filed: July 29, 2002

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Texas A&M University System, Board of Regents

Public Notice (Director of Texas Cooperative Extension)

Pursuant to Section 552.123, Texas Government Code, the following candidate is the finalist for the position of Director of Texas Cooperative Extension and upon the expiration of twenty-one days, final action

is to be taken by the Board of Regents of The Texas A&M University System.

Chester P. Fehlis

TRD-200204705
Vickie Burt Spillers
Executive Secretary to the Board of Regents
Texas A&M University System, Board of Regents
Filed: July 26, 2002

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Texas Department of Transportation

Notice of Intent, SH 99 Segment B EIS

Notice of Intent, SH 99 Segment B EIS: Pursuant to 43 TAC §2.43(e)(3), the Texas Department of Transportation (TxDOT) is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed project to develop Segment B of State Highway 99 (the Grand Parkway) from State Highway 288 to Interstate Highway 45 (South) in Brazoria and Galveston Counties, Texas.

TxDOT and the Grand Parkway Association, in cooperation with the Federal Highway Administration (FHWA), are considering an upgrade of the transportation network in Brazoria and Galveston Counties. The Environmental Impact Statement (EIS) will evaluate the transportation alternative strategies, including different combinations of modes of transportation to address existing and projected traffic demand. This study is authorized pursuant to the Texas Transportation Commission Minute Order No. 108543 issued June 28, 2001. The majority of the study corridor crosses relatively undeveloped properties in Brazoria and Galveston Counties. Cities and towns in this region include Alvin, Manvel, Dickinson, Texas City, Friendswood, Iowa Colony, Santa Fe, League City, Liverpool, Pearland, and Houston.

A public scoping meeting will be held on Thursday, September 12, 2002, at Alvin Community College, Nolan Ryan Center Community Room (R109), 2925 South Bypass 35, Alvin, Texas 77511, from 5 p.m. to 8 p.m. Large-scale maps of the project area will be displayed at the meeting. This will be the first in a series of meetings to solicit public comments on the proposed action. In addition, a public hearing will be held. Public notice will be given of the time and place of the public hearing as well as any future public meetings. The Draft EIS will be available for public and agency review and comment prior to the public hearing.

Alternatives to be studied include "No-action" (the no-build alternative), Transportation System Management (TSM)/Transportation Demand Management (TDM) alternative, mass transit alternative, and roadway build alternatives. The EIS will evaluate potential impacts from construction and operation of the proposed roadway including, but not limited to, the following: transportation impacts (construction detours, construction traffic, mobility improvement and evacuation route improvement), air and noise impacts from construction equipment and operation of the facility, water quality impacts from construction area and roadway storm water runoff, impacts to waters of the United Stated including wetlands from right of way encroachment, impacts to historic and archeological resources, impacts to floodplains, and impacts and/or potential displacements to residents and businesses.

Letters describing the proposed action and soliciting comments will be sent to appropriate federal, state, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to TxDOT at the address provided.

Agency Contact: Comments or questions concerning this proposed action and the EIS should be directed to Dianna F. Noble, P.E., Texas Department of Transportation, Environmental Affairs Division, 125 E. 11th Street, Austin, Texas 78701; phone 512-416-2734.

TRD-200204857
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: July 31, 2002

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Public Notice - Environmental Impact Statement

Pursuant to 43 TAC §2.43(e)(3), the Texas Department of Transportation is issuing a Notice of Intent (NOI) to advise the public that an environmental impact statement (EIS) will be prepared for proposed Loop 9, a new location highway, from S.H. 360 to I.H. 20 in southern Dallas and northern Ellis Counties. The project is being developed in cooperation with the Federal Highway Administration and the Dallas County Department of Public Works.

The study corridor is approximately 40 miles in length. From a regional and local perspective, there is a great demand for additional east-west transportation capacity and access throughout the limits of the corridor. Over the last 30 years, this area has experienced tremendous growth and has more than quadrupled in population.

As directed by the Transportation Efficiency Act for the 21st Century (TEA-21), the Major Investment Study (MIS) will be integrated with the EIS. The Loop 9 facility is included in the Mobility 2025 Update, the Metropolitan Transportation Plan (MTP) for the Dallas-Fort Worth region, as a new location staged parkway calling for the preservation of right-of-way through this corridor. The environmental study will examine viable alternatives and potential transportation modes including the No-Build; Transportation Systems Management / Congestion Management Systems; controlled access freeway; and other potential options. It will also include extensive and continuous public involvement to address the long-term mobility needs of both the region and local communities. The environmental study will include the determination of the number of lanes (four to six are anticipated), roadway configuration, and operational characteristics. It will also include a discussion of the effects on the social, economic, and natural environments and of other known and reasonably foreseeable agency actions proposed within the Loop 9 study corridor.

Letters describing the proposed action and soliciting comments will be sent to appropriate federal, state, and local agencies, and to private organizations and citizens who have previously expressed an interest or are known to have an interest in this proposal. A public scoping meeting is planned to be held during the summer of 2002. The date will be announced locally at a later time. This will be the first in a series of meetings to solicit public comments on the proposed action during the National Environmental Policy Act (NEPA) process. In addition, a public hearing will be held. Public notice will be given of the time and place of the meetings and the hearing. The Draft EIS will be available for public and agency review and comment before the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties.

Agency Contact: Comments or questions concerning the proposed action and the EIS should be directed to Michael C. Burbank, North Central Texas Council of Governments, 616 Six Flags Drive, Suite 200,

Centerpoint Two, Arlington, Texas 76011, or by telephone at (817) 695-9251.

TRD-200204856
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: July 31, 2002

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How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

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